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**ADVISORY COMMITTEE  
ON  
EVIDENCE RULES**

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**April 19, 2024**

# ADVISORY COMMITTEE ON EVIDENCE RULES

## AGENDA FOR COMMITTEE MEETING

April 19, 2024

Washington, D.C.

### I. Panel on Artificial Intelligence and the Rules of Evidence

For the morning session, the Committee has invited eight experts to make presentations on Artificial Intelligence and Machine Learning. In addition to providing a tutorial on AI and Machine Learning, the panel will discuss the possible use of AI as evidence, and its potential impact on the Evidence Rules.

The panelists are:

Dr. Timothy Blattner, Computer Scientist, National Institute of Standards and Technology

Alden Dima, Computer Scientist, National Institute of Standards and Technology

Michael Majurski, Computer Scientist, National Institute of Standards and Technology

Dr. Bruce Hedin, Consultant on the effectiveness of advanced search and analytics technologies at performing legal tasks.

Professor Peter Henderson, Princeton University, Department of Computer Science, School of Public and International Affairs, and Center for Information Technology Policy

Claire Leibowicz, Chief of the AI and Media Integrity Program at the Partnership on AI

Professor Andrea Roth, Barry Tarlow Chancellor's Chair in Criminal Justice, University of California Berkeley School of Law

Professor Rebecca Wexler, Faculty Co-Director, Berkeley Center for Law & Technology, University of California Berkeley School of Law

Behind Tab 1 in the Agenda Book is the Reporter's memo on AI and Machine Learning, which includes biographies of the panelists and a discussion of proposed amendments to the Evidence Rules to respond to AI and Machine Learning. Also behind Tab 1 are three articles providing an introduction to AI and Machine Learning and their potential impact on the Evidence Rules.

## **II. Committee Meeting --- Opening Business**

Opening business includes:

- Approval of the minutes of the Fall, 2024 meeting.
- Report on the January, 2024 meeting of the Standing Committee.
- Tribute to Chief Judge Schiltz for his stellar work as Chair of the Committee.

## **III. Discussion of Morning Presentations**

The Committee will have an open discussion of the takeaways from the morning presentations. This will include a discussion of the possibility of further consideration of amendments proposed by the participants in the presentations, as well as those by Paul Grimm and Maura Grossman. The question for the Committee is whether the Reporter should prepare a memo on any particular proposal for further consideration at the Committee's Fall, 2024 meeting.

## **IV. Proposal to Expand the Hearsay Exception for Prior Inconsistent Statements of Testifying Witnesses**

The Chair and Reporter recommend that the Committee consider a proposal to expand the current hearsay exception for prior inconsistent statements of testifying witnesses. They contend that all prior inconsistent statements should be admissible over a hearsay objection, because the hearsay declarant is also the witness, who is under oath, present for assessment by the jury, and subject to cross-examination. Alternatively, they propose that a corroboration requirement replace the current, restrictive requirement that substantive admissibility is limited to those statements made under oath at a formal proceeding.

The Reporter's memorandum on the expansion of the hearsay exception for prior inconsistent statements of testifying witnesses is behind Tab IV. It includes two drafting alternatives: 1) Allowing admissibility of all prior inconsistent statements; and 2) Allowing such statements to be admitted over a hearsay objection only if they are corroborated.

## **V. Proposal to Eliminate Rule 609(a)(1)**

At its last meeting, the Committee heard and considered a proposal by Professor Jeff Bellin to eliminate Rule 609, the rule allowing impeachment of witnesses with prior convictions. The Committee resolved to retain Rule 609(a)(2), which provides for automatic admissibility of those convictions containing an element of dishonesty or false statement. But the Committee agreed to consider the possibility of eliminating Rule 609(a)(1), which allows, under a permissive test, the impeachment of witnesses (including criminal defendants) with convictions that do not involve dishonesty or false statement and are accordingly less probative of the witness's character for untruthfulness. Behind Tab V is the Reporter's memo on Rule 609(a)(1).

Also behind Tab V are four additional documents: 1) a digest of district court case law applying Rule 609(a)(1)(B), the subdivision directed to criminal defendant witnesses; and 2) a report of a survey conducted by the Federal Public Defender on the effect of admissibility of convictions under Rule 609(a)(1) on the defendant's decision to testify; 3) a compendium of all written comments received in that survey; and 4) a letter in support of elimination of Rule 609(a)(1) by the Litigation Director for a Public Defender's office.

## **VI. Proposed New Rule to Cover False Accusations**

At its last meeting, the Committee heard and considered a proposal by Professor Erin Murphy to add a rule that would regulate the admissibility of false accusations. (The alternative was an amendment to several rules). The Committee resolved to undertake further consideration of a formalized proposal for a new Rule 416 to the Federal Rules of Evidence. Behind Tab VI is a memorandum by Professor Richter analyzing the proposal for a new rule covering the admissibility of false accusations.

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			Chair: 2020	2024
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# TAB 1

# TAB 1A

# FORDHAM

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Lincoln Center, 150 West 62nd Street, New York, NY 10023-7485

Daniel J. Capra  
Philip Reed Professor of Law

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Memorandum To: Advisory Committee on Evidence Rules  
From: Daniel J. Capra, Reporter  
Re: Artificial Intelligence, Machine-generated Information, and Possible Amendments to Article 9 of the FRE  
Date: April 1, 2024

At the Fall 2023 Committee meeting, the Committee received input from a number of experts on the challenges posed by the use of Artificial Intelligence and its possible impact on evidence offered at a trial. Professor Maura Grossman provided a tutorial on AI. Former Judge Paul Grimm discussed the problem of “deepfakes”; he and Professor Grossman proposed an amendment to Rule 901 addressed to the danger of admitting a deepfake as authentic. And Professor Andrea Roth discussed the reliability problems inherent in information produced by machine learning, and proffered changes to a number of Federal Rules to regulate the problem.

After discussion at the last meeting, the Committee determined that it needed more input on the questions of AI and machine-generated information before it could decide how to proceed. Members expressed the concern that, given the length of the rulemaking process, there was a real risk that any proposed amendments to deal with AI could become outmoded before they even went into effect; and that any amendment written in such general terms as to avoid being outmoded might add little to the already general and flexible language in the Federal Rules of Evidence.

At this meeting, the Reporter --- with the invaluable assistance of Dr. Timothy Lau of the FJC --- has put together a panel of experts to assist the Committee in working through the issues raised by AI and machine learning. The goals of this panel are: 1) to educate the Committee about how machines generate information that could be used at trial, and the risks that outputs from machines may not be accurate; 2) to provide insight as to how machine output might be offered in court, and thus present a challenge to the Evidence Rules; and 3) to get more insight into deepfakes and how to combat them.

This memorandum is in three parts. Part One sets forth bios of the panelists. Part Two presents a discussion of two possible sets of amendments. One is a revised proposal from Paul Grimm and Maura Grossman for an amendment to Rule 901(b)(9), and a new Rule 901(c), to cover

deepfakes and other uses of AI. The other is a set of amendments proposed by Professor Andrea Roth to regulate machine-generated evidence. Part Three is the Reporter's general discussion of authenticity and deepfakes, prepared for (and updated from) the memo in the last Agenda Book.

## **I. Panelists on AI and Machine-Generated Evidence**

### **Dr. Timothy Blattner**

Dr. Timothy Blattner is a computer scientist with a PhD in Computer Science from the University of Maryland, Baltimore County. His research interests include artificial intelligence, high performance computing, image processing, and natural language processing. Since 2011, he has been developing the front-end and back-end infrastructure for the TrojAI competition. In addition to managing the leaderboard, he has also created several rounds for the competition, focusing on natural language processing, classification, object detection, semantic segmentation, cybersecurity, and, most recently, causal language modeling using large language models, such as Llama 2. In addition to his work with AI, for the past 10 years he has been passionately developing high performance computing workflows through explainable execution models. He co-developed the Hedgehog application programming interface to accelerate application development and execution on high-end nodes. These execution models have been targeted for general use, but mostly used for large-scale high throughput and real-time image processing, in some cases utilizing trained AI models for object detection, regression, classification, and semantic segmentation.

### **Alden Dima**

Alden Dima is a Computer Scientist at the National Institute of Standards and Technology (NIST) in Gaithersburg, Maryland. He is a researcher in the Information Systems Group of the Software and Systems Division within NIST's Information Technology Laboratory. Some of his notable contributions include:

- Involvement in projects such as the Metrology Exchange to Innovate in Semiconductors (METIS) and CHIPS for America, concentrating on developing metadata for semiconductor metrology using large language models.
- Development of NLP-based tools for systematic literature review in projects like IARPA TrojAI.
- Evaluation of the benefits of trojan detector ensembles using TrojAI challenge data.
- Collaboration on initiatives like CORD-19 Infrastructure and a pilot project with the Federal Judicial Center to perform legal text analysis of Federal Court dockets using natural language processing and machine learning.
- Leadership in the development of Queryable Data Repository for the Smart Manufacturing Testbed, the Configurable Data Curation System for the Material Genome Initiative, and the International Metrology Resource Registry.
- Technical participation in projects spanning natural language processing, machine learning, materials science, scientific informatics, computational biology, computer

forensics, pervasive computing, and Java and Virtual Reality Markup Language (VRML) standardization.

Alden's work has received recognition, including sharing two NIST Bronze Medals and a Department of Commerce Gold Medal.

### **Dr. Bruce Hedin**

Dr. Bruce Hedin is a leading expert in the assessment of the effectiveness of advanced search and analytics technologies at performing legal tasks. As a consultant, he supports clients in the design and oversight of sampling and measurement protocols to validate the results of AI-enabled review technologies. He also provides guidance to counsel engaged in meet-and-confer discussions regarding the use of AI-enabled review and retrieval processes. Dr. Hedin's work is animated by the view that the adoption of AI in the service of the law must be grounded in a trust that comes from sound evidence of the effectiveness of the technology, the competence of its operators, the accountability of those responsible for its adoption and oversight, and the transparency of the process in which the technology is incorporated. Dr. Hedin has contributed to several initiatives that are in keeping with this vision; examples include a model ESI protocol (accompanied by implementation guidelines; to be published in 2023), manifestos on the rule of law in the age of artificial intelligence (published by the Transatlantic Reflection Group), the Law Chapter of Ethically Aligned Design (the flagship publication of IEEE's Global Initiative), and US NIST's Text Retrieval Conference Legal Track. Dr. Hedin is a contributor to conference proceedings and publications focused on the intersection of AI and the law; examples include: LegalAIIA, MER, The Journal of Artificial Intelligence and Law, and New York Law Journal. Dr. Hedin earned his Ph.D. from Stanford University and his B.A. from Cornell University.

### **Professor Peter Henderson**

Peter Henderson is an Assistant Professor at Princeton University, holding appointments in the Department of Computer Science, School of Public and International Affairs, and Center for Information Technology Policy. Previously, he received a JD from Stanford Law School and a PhD in Computer Science from Stanford University. His research focuses on topics at the intersection of machine learning, law, and policy and has received coverage by TechCrunch, Science, New York Times, The Wall Street Journal, Bloomberg, and more.

### **Claire Leibowicz**

Claire Leibowicz is the Head of the AI and Media Integrity Program at the Partnership on AI, where she has worked since the organization's inception. She is an expert on AI policy, generative media, and multistakeholder strategies that inform responsible AI. Under Claire's leadership, the AI and Media Integrity team creates best practices for the development and deployment of AI technologies that impact digital media and online information, in collaboration with over 100 partners from across civil society, academia, industry, and media. She oversees PAI's AI and Media Integrity Steering Committee—a formal body of experts from Adobe, Amazon, BBC, CBC, Code for Africa, Google, Meedan, Meta, Microsoft, The New York Times, UL, and WITNESS working to develop and advise projects that strengthen online public discourse.



Previously, Claire was a Fellow at the Rockefeller Foundation’s Bellagio Center exploring AI governance and worked at Harvard Law School’s Berkman Klein Center. Claire’s insights have appeared in publications such as Axios, the Associated Press, CNN, MIT Tech Review, The New York Times, and WIRED, and she has advised companies, governments, and nonprofit organizations on AI governance and digital media. Claire holds a BA in Psychology and Computer Science from Harvard, and a master’s degree from Oxford, where she studied as a Clarendon Scholar, and is currently pursuing her doctorate part-time.

### **Michael Majurski**

Michael Majurski works as a research computer scientist at National Institute of Standards and Technology (NIST). His primary field of research is machine learning and artificial intelligence with a focus on computer vision and natural language processing. His work can be split into two broad categories. 1) AI for Metrology, where AI systems are used to extract measurements from scientific datasets. 2) Metrology of AI, where the AI systems themselves are evaluated to understand system behavior and weaknesses. Michael leads the Trojan Detection in AI (TrojAI) test and evaluation effort at NIST, and is the chair of the AI Safety and Security (AISIC) working group within the NIST AI Safety Institute Consortium.

### **Professor Andrea Roth**

Andrea Roth is a Professor of Law and occupies the Barry Tarlow Chancellor’s Chair in Criminal Justice at the University of California, Berkeley School of Law. She joined the Berkeley Law faculty in 2011, after 3 years as a Grey Fellow at Stanford and 9 years as a public defender in Washington, D.C. Her research focuses on how pedigreed concepts of criminal procedure and evidentiary law work in an era of science-based prosecutions. She is the author of many articles, including “Machine Testimony,” 126 Yale L.J. 972 (2017). She is also a co-author on a leading Evidence casebook (Sklansky & Roth). In 2021, she was appointed chair of the Legal Resource Task Group of the National Institute of Standards and Technology’s Organization of Scientific Area Committees and is one of several faculty co-directors of the Berkeley Center for Law and Technology.

### **Professor Rebecca Wexler**

Rebecca Wexler is an Assistant Professor of Law at University of California Berkeley School of Law. She serves as Faculty Co-Director for the Berkeley Center for Law & Technology. Her teaching and research focus on data, technology, and secrecy in the criminal legal system, with a particular focus on evidence law, trade secret law, and data privacy. Her scholarship has appeared or is forthcoming in the Harvard Law Review, Stanford Law Review, Yale Law Journal Forum, NYU Law Review, UCLA Law Review, Texas Law Review, Vanderbilt Law Review, and Berkeley Technology Law Journal, as well as in peer-reviewed computer science publications. Professor Wexler served as senior policy advisor at the White House Office of Science and Technology Policy in Spring 2023.

## II. Proposals for Rule Amendments

There are two proposals for AI-related rules amendments for the Committee’s consideration. The question for the Committee is whether either or both of these proposals merits further development and formal presentation with a proposed Committee Note at a later meeting.

The consequence of not formally adopting the proposals below at this meeting is that any AI-related rule amendment will have to wait a year. One could argue that the Committee needs to act now, to get out ahead of what could be a sea change in the presentation of evidence. Yet there seems to be much merit in a cautious approach. To say that the area is fast-developing would be an understatement. The EU just recently scrapped its one-year-old regulations on AI, recognizing that many of the standards that were set had become outmoded. The case law on AI is just beginning. It surely makes sense to monitor the case law for (at least) a year to see how the courts handle AI-related evidence under the existing, flexible, Federal Rules.

### A. The Grimm-Grossman Proposal on Amendments to Rule 901

Proposed Modification of Current Rule 901(b)(9) for AI evidence and Proposed New Rule 901(c) for “Deepfake “Evidence  
By Paul W. Grimm & Maura R. Grossman

[901](b) **Examples.** The following are examples only—not a complete list—of evidence that satisfies the requirement [of Rule 901(a)]:

(9) *Evidence about a Process or System.* For an item generated by a process or system:

(A) evidence describing it and showing that it produces ~~an accurate~~ **a valid and reliable** result; and

**(B) if the proponent concedes that the item was generated by artificial intelligence, additional evidence that:**

**\_\_\_\_\_ (i) describes the software or program that was used; and**

**\_\_\_\_\_ (ii) shows that it produced valid and reliable results in this instance.**

*Proposed New Rule 901(c) to address “Deepfakes”*

**901(c): Potentially Fabricated or Altered Electronic Evidence. If a party challenging the authenticity of computer-generated or other electronic evidence demonstrates to the court that it is more likely than not either fabricated, or altered in whole or in part, the**

**evidence is admissible only if the proponent demonstrates that its probative value outweighs its prejudicial effect on the party challenging the evidence.**

**Rationale (prepared by Grimm and Grossman):**

Given the complexities and challenges presented by artificial intelligence generated evidence, a new rule that sets a standard for what is sufficient to authenticate such evidence would be extremely helpful. Because AI generated evidence is, by definition, evidence produced by a system or process, the proposal is to add a subsection (B) to existing 901(b)(9) to set a standard for authenticating evidence that the proponent acknowledges is AI generated. The proposed revision substitutes the words “valid” and “reliable” for “accurate” in existing rule 901(b)(9), because evidence can be “accurate” in some instances but inaccurate in others (such as a broken watch, which “accurately” tells the time twice a day but is not a reliable means of checking the time otherwise). While related, validity and reliability are distinct concepts (*see, e.g., Daubert v. Merrell Dow Pharmaceuticals, Inc*, 113 S. Ct. 2786, 2795, n.9 (1993)).

For acknowledged AI generated evidence, the proposed new rule would identify a sufficient means for authentication. It requires the proponent to (i) describe the software or program that was used to create the evidence, and (ii) show that it produced *valid* and *reliable* results in the particular case in which it is being offered. Valid evidence is evidence that produces accurate results; reliable evidence is that which produces consistently accurate results when applied to similar facts and circumstances. Both are required to ensure authenticity of AI generated evidence.

A separate rule is required to address the relatively recent phenomenon of AI generated “deepfakes.” Rapidly improving generative AI software applications are capable of producing fabricated (or altering existing) photographs, audio recordings, and audio-visual recordings that are so realistic that it is becoming very difficult to differentiate between authentic evidence and fabricated/altered evidence. A separate rule is needed for such fake evidence, because when it is offered the parties disagree about the nature of the evidence. The opposing party challenges the authenticity of the evidence and claims that it is AI generated fakery, while the proponent insists that it is not AI generated, but instead that it is simply an electronic photograph (for example, one taken on a “smart phone”), or a voice recording (such as one left on voice mail) or audio-visual recording (such as one taken with a “smart phone” or digital camera). Because the parties fundamentally disagree about the very nature of the evidence, the proposed rule for authenticating acknowledged AI generated evidence will not work. A separate rule is required.

The proposal creates a new rule 901(c). That is because the evidence challenged as AI generated fakery may be authenticated by many means other than Rule 901(b)(9), which focuses on evidence generated by a “system or process.” The proponent might choose to authenticate an audio recording under Rule 901(b)(5) (opinion as to voice), Rule 901(b)(3) (comparison of evidence known to be authentic with other evidence the authenticity of which is questioned), or 901(b)(4) (distinctive characteristics).

The proposed rule does not use the word “deepfake”, because it is not a technical term, but instead describes the evidence as being either computer-generated (which encompasses AI-generated evidence) or electronic evidence, which encompasses other forms of electronic evidence that may not be AI generated (such as digital photographs, or digital recordings).

The proposed rule puts the initial burden on the party challenging the authenticity of computer generated/electronic evidence as AI generated fakery to make a showing to the court that it is more likely than not either fabricated or altered in whole or part. This standard is similar to the showing required by the proponent of scientific, technical, or specialized evidence under newly revised Rule 702. It requires the challenging party to produce evidence to support the claim that it is fabricated/altered; mere conclusory allegations are insufficient. But if the challenging party makes the required showing, then the burden shifts to the proponent of the challenged evidence to show that its probative value outweighs its prejudicial effect on the party challenging the evidence. This is the same showing required by Rule 609(a)(1)(B), and is a lesser showing than a “reverse balancing” test such as used in Rule 609(b)(1) or Rule 703.

If the party objecting to the evidence as being AI or computer-generated fakery fails to make the showing to the court that it more likely than not is fabricated/altered, then the court will allow the proponents evidence and the opposing party’s evidence to go to the jury under Rule 104(b). But, if the opposing party makes the required showing and the proposing party fails to show that the probative value of the challenged evidence outweighs its prejudicial effect on the challenging party, the court will exclude the evidence under Rule 104(a).

### **Reporter’s Comment on the Grimm/Grossman Proposal:**

The proposal addresses the two major evidentiary concerns posed by AI: 1. The reliability of machine learning output; and 2. How to deal with deepfakes and, on the other hand how to regulate a blanket “it’s a deepfake” claim for every audio and video.

Some questions about application of the proposal might be clarified once the courts start dealing in earnest with AI evidence. Here are some of the questions:

1. The proposal distinguishes the terms "validity," "reliability," and "accuracy." That is complicated and perhaps may be unnecessary for a rule of evidence. As to validity and reliability, the current rules --- most importantly Rule 702 --- use the term reliability. Certainly there are those who can draw a distinction between validity and reliability, but is it worth it? The term "validity" is used in the Evidence Rules only in the context of "validity of the claim" as in Rule 408. Here, validity is used as a scientific term and it is unclear how much it adds to the rule. As to "accuracy", the proposal rejects the term, but in fact there is a good deal of material on machine learning that emphasizes "accuracy." See, e.g., <https://www.evidentlyai.com/classification-metrics/accuracy-precision-recall> ("Accuracy is a metric that measures how often a machine learning model correctly predicts the outcome. You can calculate accuracy by dividing the number of correct predictions by the total number of predictions. In other words, accuracy answers the question: how often the model is right?"). At any rate, more thought and discussion, and resort to other experts in the field, may be necessary to make sure that a proposed amendment gets the terminology: 1)

correct in terms that experts in the field would understand, but also 2) correct enough for lawyers and judges to work with in real life. The whole area is complicated enough without adding distinctions that may not make a difference.

2. The proposed Rule 901(c) addresses an important problem: how to regulate an automatic objection “it’s a deepfake” for every offered photo, audio, or visual presentation. The question is whether that is a problem that might be handled by the courts under the existing Rule 901. As discussed in a memo prepared for the last meeting, and replicated below, a similar concern arose during the rise of texts and social media: the concern that every opponent would argue “my Facebook post was hacked, my text was hacked” and so on. It turned out that courts handled that wave of objections by holding that something more than a mere assertion was necessary before an inquiry would be taken into the authenticity of texts and social media. Courts have specifically rejected blanket claims like “my account was hacked” --- because such an argument can always be made. Thus, courts have consistently held that “the mere allegation of fabrication does not and cannot be the basis for excluding ESI as unauthenticated as a matter of course, any more than it can be the rationale for excluding paper documents.”<sup>1</sup> Courts properly require some showing from the opponent before inquiring into charges of hacking and falsification of digital information.<sup>2</sup>

The question is whether courts will similarly be able to handle blanket claims of “it’s a deepfake.” There are good arguments on both sides. The argument for no change is that courts handled the previous wave just fine, so there is no need to be concerned about such blanket arguments when it comes to deepfakes. The argument for a new rule is that deepfakes are extremely hard to detect, and while hacking Facebook posts might be a rare occurrence, the potential use of deepfakes could well be broader and wider. Moreover, a concrete standard for justifying an inquiry --- such as that set forth in the proposal --- could be more useful to the court than the general standards that can be found only in the case law.

It would seem that resolving the argument about the necessity of the rule should probably be delayed until courts actually start dealing on a regular basis with deepfakes. Only then can it be determined how necessary a rule amendment really is. Moreover, the possible prevalence of deepfakes might be countered in court by the use of watermarks and hash fingerprints that will assure authenticity (as discussed below). Again, the effectiveness of these countermeasures will only be determined after a waiting period.

3. The balancing test in the proposal--- applied when the burden-shifting trigger is met --- is that the “probative value” must outweigh the prejudicial effect. It can be argued that importing this standard confuses authenticity with probative value. If a picture shows a defendant punching a victim, in an assault prosecution, it is undeniably highly probative and not prejudicial at all. What about if it is fake? That is a question of authenticity, which is one of *conditional relevance*. It is relevant only if it is authentic. Does it work to then make this question of conditional relevance dependent on a showing that probative value substantially outweighs the prejudice? It arguably confuses matters. Put another way, the probative value of the evidence can only logically be

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<sup>1</sup> United States v. Safavian, 435 F. Supp. 2d 36, 38 (D.D.C. 2006).

<sup>2</sup> See Grimm, Capra and Joseph, *Authenticating Digital Evidence*, 69 Baylor Law Review 1, 3-5 (2017) (reviewing the showing necessary for an inquiry into falsification of digital evidence).

assessed after it is determined to be authentic. Having authenticity depend on probative value is a pretty complicated endeavor. Moreover, presumably the prejudice referred to is that the item might be a deepfake. But if the proponent can establish that it is authentic, then there would be no prejudice to weigh.

An alternative might be that once the opponent makes a showing sufficient to justify an inquiry, e.g., "more likely than not that the item was generated by artificial intelligence" then the proponent has the burden of showing it *more likely than not that the item is authentic*. For example, take a photo with nine people in it. A deepfaker has put Taylor Swift in the photo. The proponent could still show that the item is authentic if he wanted to prove that one of the other people was in the photo. Or take an audio tape. The opponent can show that AI was used in the preparation of the item. But the proponent might be able to respond that the AI was used to filter out ambient noise, and that this enhanced rather than falsified the item. In both these cases, the question is not prejudicial effect and probative value. It is what Article 9 is asking about: is it authentic?

This burden-shifting alternative on the question of authenticity has its problems, as well -- the most obvious being that it imports a Rule 104(a) standard for an authenticity question, while all other authenticity questions are decided under Rule 104(b). But that differentiation may be justified by the problems inherent in detecting deepfakes. At any rate, more discussion in the Committee is necessary to figure out whether, if there is going to be an amendment, what requirement must be placed on the proponent once the opponent shows enough to justify a deepfake inquiry.

### **Professor Wexler's Comments on the Grimm/Grossman Proposal**

Professor Rebecca Wexler of the University of California, Berkeley, is participating in the AI panel, and I solicited her impressions of the Grimm/Grossman proposed amendments to Rule 901. She basically supported the proposals but suggested that they should be extended beyond AI to other authenticity questions. Here is her position:

Re: the first Grimm/Grossman proposal, it may well be that the standard for authenticating system/process evidence should require a showing that the system/process produces "valid" and "reliable" results, rather than merely accurate results. And it may well be that if a party can demonstrate that an item of physical evidence is more likely than not either fabricated or altered, then the proponent should have to demonstrate that its probative value outweighs its prejudicial effect. However, why not apply those amendments more generally to all system/process and potentially fabricated items of physical evidence? I don't see the benefit of narrowing the amendment solely to AI.

I can understand the push to add a reliability requirement to 901(b)(9). It's true that ML systems could rely on an opaque logic that gives accurate results most of the time but then sometimes goes off the rails and creates some seemingly illogical output. But manually coded systems can do the same thing. They could be deliberately or mistakenly programmed to fail in unexpected conditions, or even once every hundred runs on the same input data. So if reliability is important, why not make it a broader requirement?

Re: the second Grimm/Grossman proposal, I don't see why that modification should be cabined to AI or even more broadly to all computer-generated or electronic evidence. There is no evidence that it's harder to determine if a photograph was a deepfake than if a written note was forged. In both cases, a direct examination of the documents might not determine the issue, and the court and ultimately jury may have to rely more on circumstantial evidence to make a determination, or credibility determinations about the witnesses who testify for and against authenticity. Why not apply the proposed 901(c) rule to any evidence that the opponent can show by preponderance is likely to be fake? Again, it might be a great reform and perhaps the advisory committee should do it, but it's not unique to AI evidence (though it is pertinent to AI evidence).

***I asked Paul Grimm and Maura Grossman on their reaction to possibly extending their amendments beyond AI. They thought that such an extension would be problematic. Here is their position:***

AI is a game changer and special rules are needed. We also think that it is prudent to be incremental when you start changing authentication rules or adopting balancing tests that differ from 403. You should not upset the apple cart with bold changes absent a showing that the existing rules really cannot address the problem adequately. Moreover, you only have to look at the various iterations of how you can authenticate under 901 and 902 to see that we always have had special rules for special kinds of evidence. We think that the tweak we have offered to 901(b)(9) and new rule 901(c) help with AI and deepfake evidence that is qualitatively different from other types of evidence. We simply have not had the same problems with forged documents or photoshopped photos (where the metadata readily shows the alteration) that we face with AI.

We don't want the perfect to be the enemy of the good enough for these purposes here. The rules have worked with the terms "accurate" and "reliable" for many purposes, but as we move into a more technical world involving more technical analyses (e.g., AI), we think it is preferable to use the proper technical terms and to make clearer to judges that there are two distinct things they need to consider (i) does the AI predict what it is supposed to? (validity) and (ii) does it do so consistently under substantially similar circumstances? (reliability).

The other point is that deepfakes are fundamentally different from other kinds of fake evidence. First, they have moved beyond the capability of being perceived and distinguished by non-experts; second, anybody with a computer and Internet connection can make them, for free in under ten minutes; and third, most of the technical tools available for distinguishing them do not work well as of yet. See attached. That's very different than other data.

## **B. Professor Roth's Proposed Amendments to Address Machine Learning Evidence**

At the last Committee meeting, Professor Andrea Roth proposed changes to the Federal Rules to give courts the tools to regulate machine-generated evidence. In broad summary, her basic

concern is that now many machines are thinking like people, and are making out of court statements like people would. For real people, the solution to such out of court statements is cross-examination. But the hearsay rule does not work well for machine-based outputs, because machines cannot be cross-examined. So in the absence of hearsay regulation, what can be added to the rule that would regulate the reliability problems inherent in machine-generated information? (Those problems include subjective selection and interpretation of data, contextual bias, and inaccessibility to source codes and data collection practices).

**1. Proposed amendment to Rule 702.** Professor Roth's most important recommendation is an addition to Rule 702. It would be a new subdivision, independent from the current rule. This would require some stylistic reconstruction of the existing rule. The proposed addition is as follows:

2) Where the output of a process or system would be subject to part (1) if testified to by a human witness, the proponent must demonstrate to the court that it is more likely than not that:

(A) The output will help the trier of fact to understand the evidence or to determine a fact in issue;

(B) The output is based on sufficient and pertinent inputs and data, and the opponent has reasonable access to those inputs and data;

(C) The output is the product of reliable principles and methods; and

(D) The output reflects a reliable application of the principles and methods to the facts of the case, based on the process or system's demonstrated reliability under circumstances or conditions substantially similar to those in the case.

(3) The output of basic scientific instruments and tools are not subject to the requirements of this rule.

### **Reporter's Comment**

1. The proposal addresses what could be thought to be a gap in the rules. Expert witnesses must satisfy reliability requirements for their opinions, but it is a stretch, to say the least, to call machine learning output an "opinion of an expert witness." Machine output is explicitly regulated today, as a matter of authenticity, by Rule 901(b)(9): the proponent must show that evidence of a machine process "produces an accurate result." But that authenticity standard is the mild one of Rule 104(b). And nothing in Rule 901(b)



specifically requires the kind of showing on reliability that must be made with respect to a human expert. The goal of both proposals discussed in this memo (Grimm/Grossman and Roth) is to apply *Daubert*-like requirements to machine learning evidence.

2. Professor Roth's proposal basically applies the existing Rule 702 to machine learning. The additions are that: a) facts or data is now "inputs and data"; b) the opponent must have reasonable access to those inputs and data; and c) the reliable application prong must be evaluated "based on the process or system's demonstrated reliability under circumstances or conditions substantially similar to those in the case." Thought must be given to whether these are critical conditions or whether they are implicit in the existing rule once applied to machine learning, and maybe are better placed in a Committee Note. There is a good argument that these are helpful tweaks, but perhaps they are sufficiently well-placed in the Note if the payoff is a less complicated drafting solution. See below for the simpler alternative.

3. There is a rulemaking problem in amending Rule 702 so soon after the 2023 amendment. Generally it is a bad idea to keep tinkering with a rule. That could be explained here by the fact that AI-related evidence is a concept that exploded only recently --- after the 2023 amendment had been proposed for public comment. All that said, if the Committee is interested in a Rule 702 solution to AI evidence, then the rulemaking issue is one more good reason to wait a year or so.

4. A proposal that would avoid tinkering with Rule 702 would be to add a new rule to govern machine-related evidence, by incorporating the Rule 702 standards. Something like this:

#### **Rule 707. Machine-generated Evidence**

Where the output of a process or system would be subject to Rule 702 if testified to by a human witness, the court must find that the output satisfies the requirements of Rule 702.

It doesn't help to restate all the Rule 702 requirements. And to the extent that there is some difference in the text of a new Rule and Rule 702, questions will be created about how to handle an overlap. You could add a lot to the Committee Note to describe just how the machine data should be evaluated at a *Daubert* hearing --- including a statement that the opponent must get reasonable access to the inputs and data. You could also clarify that the rule is not intended to cover simple machine data like, for example, a blood pressure monitor.

**2. Proposed amendment to Rule 806.** Professor Roth suggests that Rule 806 be amended to allow opponents to "impeach" machine output in the same way as they would impeach hearsay testimony from a human witness. She proposes an additional subsection to Rule 806:

(2) When output of a process or system has been admitted in evidence, and would be a hearsay statement if uttered by a human declarant, the output's accuracy may be attacked, and then supported, by any evidence that would be admissible for those purposes if the output had been uttered by a human declarant. The court may admit evidence of the process or system's inconsistent output, or prior false output where probative of the admitted output's accuracy, for these purposes as well.

**Reporter's Comment:** The goal here is to treat machine learning --- which is thinking like a human --- the same way that a human declarant may be treated. Thought must be given to whether all the forms of impeachment are properly applicable to machine learning. For example, it would seem that a machine doesn't have a character for truthfulness; prior convictions of a machine do not exist. Presumably the machine could make a prior inconsistent statement. A machine output could be contradicted. A machine output can definitely be impaired by bias, at least speaking broadly, if it is relying on data and terminology that is affected by bias. And finally, it seems unlikely that a machine can be impeached by incapacity (ability to recall and relate).

The question is whether an improper signal is given by applying 806 wholesale to machine-related evidence, when in fact not all the forms of impeachment are workable as applied to machines. That said, assuming that some AI-related rule is necessary, it seems like a good idea, eventually, to have a rule addressing the permitted forms of impeachment of machine learning evidence.

**3. Rule 901(b)(9).** Professor Roth suggests adding standards to the basic authentication rule for machine-based evidence.

**(9) Evidence About a Process or System.** Evidence describing a process or system and showing that it produces a ~~an accurate~~ reliable result, including, with the exception of basic scientific instruments, all of the following:

(A) that the opponent had fair pretrial access to the process or system;

(B) in a criminal case, the proponent has disclosed all previous output of the process or system that, if the process or system were a human witness, would be disclosable under 18 U.S.C. §3500;

(C) that the process or system has been shown through testing by a financially and otherwise independent entity to produce an accurate result under conditions substantially similar to the instant case;

(D) that the process or system, or a license to use it, is accessible to independent research bodies, including the National Institute of Standards and Technology and accredited educational institutions, for purposes of conducting audits of the process or system;

(E) that the process or system is either open source or the proprietor has given the National Institute of Standards and Technology access to its source code;

(F) that, in a criminal case, the proponent has not invoked a trade secrets privilege to block access or disclosure to the process or system or its source code.

### **Reporter's Comments:**

1. The additions to 702 are intended to guarantee reliability, and will be applied under the Rule 104(a) standard. It would be better to regulate machine evidence as if it were expert testimony. It would then make it unnecessary to add other standards at the authenticity level, which is governed by the Rule 104(b) standard. It should be noted that Professor Roth is not necessarily suggesting changes to Rule 901(b)(9) in addition to Rule 702 --- rather that if Article 7 changes somehow don't work out, changes to Rule 901(b)(9) could be usefully considered. In other words, if changes are made to require a *Daubert*-like review of machine data, then there is no need to add anything to Rule 901(b)(9) --- and arguably there is no need to even *have* a Rule 901(b)(9) to cover machine data, as the question is reliability, not authenticity.

2. Several of the requirements are about accessibility --- e.g., the provisions on trade secrets, pretrial access, and the Jencks Act alternative. It is unclear why these factors are necessary conditions of a showing of authenticity. This is not to say they would not be useful. But it is to say that thought must be given to their connection with a showing of authenticity.

3. Rule-drafting concerns exist with respect to two provisions. Subdivision (B) includes the citation to the Jencks Act. But proper rulemaking does not include citations in text --- for fear that the citation will change and then the rule would need to be amended. So if that provision were to be approved, it should say something like "under federal statute" and then the Committee Note could refer to the Jencks Act. See the 1998 amendment to Rule 615, adding "by statute" to the text, and referring to a specific statute in the Note. Another rule-drafting concern is the reference to NIST. A more general reference would be preferable.

4. It's a lot of regulations and requirements. The Committee, if interested in the proposal, will need to work through which are necessary and which, if any, are unduly burdensome at the authenticity stage. Or whether, if required, they should be in another Evidence Rule, or maybe in the Criminal and Civil rules.

**4. Rule 902(13).** Professor Roth suggests additions to the rule enacted in 2017, which allows authentication of electronic evidence by way of affidavit.

**13) Certified Records Generated by an Electronic Process or System.** A record generated by an electronic process or system that produces an accurate result, as shown by a certification of a qualified person that complies with the certification requirements of Rule 902(11) or (12). The proponent must also meet the notice requirements of Rule 902(11). In particular, with the exception of basic scientific instruments, the certificate must show that:

(A) the opponent had fair pretrial access to the process or system;

(B) in a criminal case, the proponent has disclosed all previous output of the process or system that, if the process or system were a human witness, would be disclosable under 18 U.S.C. §3500;

(C) that the process or system has been shown through testing by a financially and otherwise independent entity to produce an accurate result under conditions substantially similar to the instant case;

(D) that the process or system, or a license to use it, is accessible to independent research bodies, including the National Institute of Standards and Technology and accredited educational institutions, for purposes of conducting audits of the process or system;

(E) that the process or system is either open source or the proprietor has given the National Institute of Standards and Technology access to its source code; and

(F) that, in a criminal case, the proponent has not invoked a trade secrets privilege to block access or disclosure to the process or system or its source code.

**Reporter's Comments:** The safeguards here are the same as would be added to Rule 901(b)(9). As such, they are unnecessary here. Rule 902(13) does not set substantive standards for authenticity. Rather, it permits other grounds of authenticity (specifically the grounds set forth in Rule 901(b)(9)) to be established by affidavit in lieu of live testimony of a knowledgeable witness. Therefore, there is no need to replicate any substantive standards of Rule 901(b)(9). One could argue that the reference to an "accurate result" is insufficient if new standards are added to Rule 901(b)(9). But the answer is not to copy out all the standards here. The answer would be to amend Rule 902(13) as follows:

A record generated by an electronic process or system that ~~produces an accurate result~~ meets the requirements of Rule 901(b)(9), as shown by a certification of a qualified person that complies with the certification requirements of Rule 902(11) or (12).

### III. The Problem of Deepfakes

A deepfake is an inauthentic audiovisual presentation prepared by software programs using artificial intelligence. Of course, photos and videos have always been subject to forgery, but developments in AI make deepfakes much more difficult to detect.<sup>3</sup> Software for creating deepfakes is already freely available online and fairly easy for anyone to use.<sup>4</sup> As the software's usability and the videos' apparent genuineness keep improving over time, it will become harder for computer systems, much less lay jurors, to tell real from fake.<sup>5</sup>

Generally speaking, there is an arms race between deepfake technology and the technology that can be employed to detect deepfakes. Deepfakes involve machine learning algorithms that are simultaneously pitted against one another.<sup>6</sup> One of these programs is a generative model that creates new data samples; the other, known as a discriminator model, evaluates this data against a training dataset for authenticity. The discriminator model estimates the probability that the sample came from the generative model (a machine creation) or sample data (a real-world original). These two models operate in a cyclical fashion and learn from each other. The generative model program is learning to create false data, and the discriminator model is learning to identify whether the data

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<sup>3</sup> Robert Chesney & Danielle Keats Citron, *Deep Fakes: A Looming Challenge for Privacy, Democracy, and National Security*, 107 Calif. L. Rev. 1753, 1760 (2019). Some of the famous deepfakes are pretty easy to root out with minimal inquiry. The Nancy Pelosi video was debunked simply by playing it slower. The Pope picture, upon scrutiny, shows up as a fake because his medal is not sitting on his chest, and his fingers are not accurate. But it is very likely that future developments will make deepfakes harder to detect.

<sup>4</sup> See *12 Best Deepfake Apps and Websites That You Can Try for Fun*, <https://beebom.com/best-deepfake-apps-websites>.

<sup>5</sup> MIT has provided a checklist that can be used to help detect a deepfake, though MIT makes no promises:

When it comes to AI-manipulated media, there's no single tell-tale sign of how to spot a fake. Nonetheless, there are several DeepFake artifacts that you can be on the lookout for:

1. Pay attention to the face. High-end DeepFake manipulations are almost always facial transformations.
2. Pay attention to the cheeks and forehead. Does the skin appear too smooth or too wrinkly? Is the agedness of the skin similar to the agedness of the hair and eyes? DeepFakes may be incongruent on some dimensions.
3. Pay attention to the eyes and eyebrows. Do shadows appear in places that you would expect? DeepFakes may fail to fully represent the natural physics of a scene.
4. Pay attention to the glasses. Is there any glare? Is there too much glare? Does the angle of the glare change when the person moves? Once again, DeepFakes may fail to fully represent the natural physics of lighting.
5. Pay attention to the facial hair or lack thereof. Does this facial hair look real? DeepFakes might add or remove a mustache, sideburns, or beard. But, DeepFakes may fail to make facial hair transformations fully natural.
6. Pay attention to facial moles. Does the mole look real?
7. Pay attention to blinking. Does the person blink enough or too much?
8. Pay attention to the lip movements. Some deepfakes are based on lip syncing. Do the lip movements look natural?

<https://www.media.mit.edu/projects/detect-fakes/overview/>

<sup>6</sup> Chris Nicholson, *A Beginner's Guide to Generative Adversarial Networks (GANs)*, PATHMIND, <https://pathmind.com/wiki/generative-adversarial-network-gan> [<https://perma.cc/JEY9-K283>].

is artificial. The generative model constantly improves its ability to create data sets that have a lower probability of failing the detection algorithm as the discriminator model learns to keep up, a process that continuously improves the apparent genuineness of the creation. So anytime new software is developed to detect fakes, deepfake creators can use that to their advantage in their discriminator models. A New York Times reporter reviewed some of the currently available programs that try to detect deepfakes. The programs varied in accuracy. None was accurate 100% of the time.<sup>7</sup>

It should be noted that various digital tools have been introduced for authenticating video recordings that a party has prepared. These tools allow the proffering party to vouch for video recordings' authenticity through an electronic seal of approval.<sup>8</sup> While the use of such methods increases the costs of litigation, they do appear, generally, to answer most "deepfake" claims from the opponent. While watermarks can be evaded, Professor Hany Farid states that the use of watermarks together with an identifying fingerprint is an effective way to combat the threat of deepfakes.<sup>9</sup> The limitation on the software is that the electronic stamp of genuineness occurs during the process in which the video is being generated; it does not work with videos, say, taken off the internet.<sup>10</sup>

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<sup>7</sup> See *How Easy Is it to Fool A.I. Detection Tools?* <https://www.nytimes.com/interactive/2023/06/28/technology/ai-detection-midjourney-stable-diffusion-dalle.html?smid=nytcore-ios-share&referringSource=articleShare>. See also *Another Side of the A.I. Boom: Detecting What A.I. Makes*, <https://www.nytimes.com/2023/05/18/technology/ai-chat-gpt-detection-tools.html> ("Detection tools inherently lag behind the generative technology they are trying to detect. By the time a defense system is able to recognize the work of a new chatbot or image generator, like Google Bard or Midjourney, developers are already coming up with a new iteration that can evade that defense. The situation has been described as an arms race or a virus-antivirus relationship where one begets the other, over and over.").

<sup>8</sup> *Ticks or It Didn't Happen: Confronting Key Dilemmas in Authenticity Infrastructure for Multimedia*, at 6, WITNESS (December 2019), <https://lab.witness.org/ticks-or-it-didnthappen/> ("The idea is that if you cannot detect deepfakes, you can, instead, authenticate images, videos and audio recordings at their moment of capture."); Riana Pfefferkorn, *Deepfakes in the Courtroom*, 29 Public Interest Law Journal 245, 259 (2020) ("So-called verified media capture technology can help to ensure that the evidence users are recording is trusted and admissible to courts of law. For example, an app called eyeWitness to Atrocities allows photos and videos to be captured with information that can firstly verify when and where the footage was taken, and can secondly confirm that the footage was not altered, all while the company's transmission protocols and secure server system create a chain of custody that allows this information to be presented in court. That information, paired with the app-maker's willingness to provide a certification to the court or send a witness to testify if needed, could satisfy a court that the video is admissible, even if the videographer is unavailable.").

<sup>9</sup> See Hany Farid, *Artificial Intelligence: A Primer for Legal Practitioners* at 17 ("Therefore, in addition to embedding watermarks, a creator can extract an identifying fingerprint from the content and store it in a secure centralized ledger. . . . The provenance of a piece of content can then be determined by comparing the fingerprint of any image or video to the fingerprint stored in the ledger. Both watermarks and fingerprints can be made cryptographically secure, making it difficult to forge.").

<sup>10</sup> See, e.g., *A New Tool Protects Videos from Deepfakes and Tampering*, <https://www.wired.com/story/amber-authenticate-video-validation-blockchain-tampering-deepfakes/> ("Called Amber Authenticate, the tool is meant to run in the background on a device as it captures video. At regular, user-determined intervals, the platform generates 'hashes'—cryptographically scrambled representations of the data—that then get indelibly recorded on a public blockchain. If you run that same snippet of video footage through the algorithm again, the hashes will be different if anything has changed in the file's audio or video data—tipping you off to possible manipulation.").

Besides the challenge of determining whether a video is faked, some commentators are concerned about a “reverse CSI effect.” Jurors, knowing about deepfakes, “fake news”, etc., may start expecting the proponent of a video to use sophisticated technology to prove to their satisfaction that the video is not fake.<sup>11</sup> The other concern expressed is that over time, skepticism over video evidence may undermine the use of perfectly authentic videos --- though how that concern is to be addressed in an Evidence Rule is a mystery.

## **A. Basic Rules on Authenticity**

Under Rule 901(a), the standards for authenticity are low. The proponent must only “produce evidence sufficient to support a finding that the item is what the proponent claims it is.” Under the rule, the question of authenticity is one of conditional relevance — an item of evidence is not relevant unless it is what the proponent purports it to be. (For example, a sexually harassing statement in an email, purportedly sent from the plaintiff’s supervisor, is probative only if it is the supervisor who sent it). As a question of conditional relevance, the admissibility standard under Rule 901 is the same as that provided by Rule 104(b): Has the proponent offered a foundation from which the jury could reasonably find that the evidence is what the proponent says it is. This is a mild standard — favorable to admitting the evidence. The drafters of the rule believed that authenticity should generally be a jury question because, if a juror finds the item to be inauthentic, it just drops from the case, so no real damage is done; Rule 901 basically operates to prevent the jury from wasting its time evaluating an item of evidence that clearly is not what the proponent claims it to be.

The structure of the Rule is as follows: 1) subdivision (a) sets the general standard for authenticity — enough admissible evidence for a juror to believe that the proffered item is what the proponent says it is; 2) subdivision (b) provides examples of sufficient authentication; if the standard set forth in any of the illustrations is met, then the authenticity objection is overruled and any further question of authenticity is for the jury; and 3) the illustrations are not intended to be independent of each other, so a proponent can establish authenticity through a single factor or combination of factors in any particular case. Finally, it should be noted that Rule 902 provides certain situations in which the proffered item will be considered self-authenticating — no reference to any Rule 901(b) illustration need be made or satisfied if the item is self-authenticating.

In order for the trier of fact to make a rational decision as to authenticity, the foundation evidence must itself be admissible. If the opponent still contests authenticity at trial, the proponent will need to present admissible evidence of the authenticity of the challenged item. This means that the judge’s role when an authentication issue arises differs from the judge’s role when other issues arise involving the admissibility of evidence at a Rule 104(a) hearing (under which the rules of evidence other than privilege are inapplicable). When authentication evidence is offered, a jury must be provided sufficient admissible evidence for it to find that it is what the proponent claims, or the requirement of authentication is not satisfied. A judgment as to whether a reasonable jury

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<sup>11</sup> Rebecca Delfino, *Deepfakes on Trial: A Call to Expand the Trial Judge’s Gatekeeping Role to Protect Legal Proceedings from Technological Fakery*, 74 *Hastings L.J.* 293 (2023).



will find evidence to be authentic can only be made by examining the evidence that the jury will be permitted to hear.<sup>12</sup>

Applying the current authentication rules to deepfakes raises at least two concerns: 1. Because deepfakes are hard to detect, many deepfakes will probably satisfy the low standards of authenticity; and 2. On the other hand, the prevalence of deep fakes will lead to blanket claims of forgery, requiring courts to have an authenticity hearing for virtually every proffered video.

## **B. Prior Committee Decision on Special Authentication Rules for Electronic Evidence.**

The rise of deepfakes is not the only technological advancement that has challenged the existing rules on authentication. In 2014, the Advisory Committee undertook a project to consider whether rules should be added to Article 9 to address digital communications and social media postings. The proposal considered was to have special rules on authenticating emails, texts, social media postings, and so forth. After significant discussion, the Committee decided not to proceed with the project. According to the Minutes of the Fall, 2014 meeting, the reasons for rejection were as follows:

1. The current rules are flexible enough to handle questions about the authenticity of digital communications. For digital evidence, the most useful authentication rules within Rule 901(b) are: 901(b)(1) (a witness with personal knowledge that the evidence is what it purports to be); 901(b)(3) (comparison of the evidence with an authenticated specimen by an expert witness or the finder of fact); 901(b)(4) (the appearance, contents, substance, internal patterns or other distinctive characteristics of the item, taken together with all the circumstances); 901(b)(5) (for audio recordings, an opinion identifying a person’s voice, whether heard firsthand or through electronic transmission or recording, based on having heard that voice in the past); and 901(b)(9) (evidence describing a process or system of showing that it produces an accurate result). These rules give the court all the tools it needs to determine the authenticity of digital evidence.

2. Any rules directed specifically toward digital communications would likely overlap with the provisions already in Rule 901(b). Certainly distinctive characteristics would be important for authenticating digital evidence; and authentication of, say, email would use analogous principles of authenticating telephone conversations. This overlap, between new and old rules, would likely cause confusion.

3. Listing factors relevant to authentication would run the risk of misleading courts and litigators into thinking that all of the listed factors can or should be weighed equally, when in fact a case-by-case approach is required.

4. Given the deliberateness of rulemaking --- three years minimum --- there was a risk that any rule on digital communications could be dead on arrival. I called it the MySpace problem.<sup>13</sup>

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<sup>12</sup> See *United States v. Bonds*, 608 F.3d 495 (9th Cir. 2010) (records could not be authenticated where the only basis for authentication was a hearsay statement not admissible under any exception); *Lorraine v. Markel American Ins.*, 241 F.R.D. 534, 537 (D.Md. 2007) (“Because, under Rule 104(b), the jury, and not the court, makes the factual findings that determine admissibility, the facts introduced must be admissible under the rules of evidence.”).

<sup>13</sup> It should be noted that the Committee did propose two new rules to deal with authenticating digital evidence --- Rules 902(13) and (14), which became effective in 2017. But these rules do not add or change any grounds of

In hindsight, it is fair to state that the Committee’s decision to forego amendments setting forth specific grounds for authenticating digital evidence was the prudent course. Courts have sensibly, and without extraordinary difficulty, applied the grounds of Rule 901 to determine the authenticity of digital evidence.<sup>14</sup> Courts have specifically rejected blanket claims like “my account was hacked” --- because such an argument can always be made. Courts properly require some showing from the opponent before inquiring into charges of hacking and falsification of digital information. Thus, courts have consistently held that “the mere allegation of fabrication does not and cannot be the basis for excluding ESI as unauthenticated as a matter of course, any more than it can be the rationale for excluding paper documents.”<sup>15</sup>

It is true that litigators have to know what they are doing when they try to authenticate digital evidence, and it is also true that authenticating digital evidence can be costly, but no rule of evidence would change that.<sup>16</sup> Moreover, some costs of proving authenticity can be saved by the affidavit procedures established for authentication of digital evidence in Rules 902(13) and (14).<sup>17</sup>

The fact that the Committee decided not to promulgate special rules on digital communication is a relevant data point, but it is not necessarily dispositive of amending the rules

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authentication for digital evidence. Rather they allow the existing grounds to be established by a certificate of a person with knowledge, thus dispensing with the requirement of in-court testimony.

<sup>14</sup> See, e.g., *United States v. Fluker*, 698 F.3d 988 (7th Cir. 2012) (the court, in outlining the variety of ways in which an email could be authenticated, stated that testimony from a witness who purports to have seen the declarant create the email in question was sufficient for authenticity under Rule 901(b)(1)); *United States v. Barnes*, 803 F.3d 209 (5th Cir. 2015) (government laid a proper foundation to authenticate Facebook and text messages as having been sent by the defendant; the defendant was a quadriplegic, but the witness who received the messages testified she had seen the defendant use Facebook, she recognized his Facebook account, and the Facebook messages matched the defendant’s manner of communicating: “[a]lthough she was not certain that Hall [the defendant] authored the messages, conclusive proof of authenticity is not required for admission of disputed evidence”); *United States v. Lundy*, 676 F.3d 444 (5th Cir. 2012) (testimony by one party to chat that the chats are as he recorded them is enough to meet the low threshold for authentication); *United States v. Needham*, 852 F.3d 830, 836 (8th Cir. 2017) (“Exhibits depicting online content may be authenticated by a person’s testimony that he is familiar with the online content and that the exhibits are in the same format as the online content. Such testimony is sufficient to provide a rational basis for the claim that the exhibits properly represent the online content. . . [The witness] testified that he personally viewed the [webpages] and that the screenshots accurately represented the online content of both sites. Thus, the district court did not abuse its discretion by admitting the screenshots.”); *United States v. Recio*, 884 F.3d 230 (4th Cir. 2018) (the government sufficiently tied the “Facebook User” to the defendant by showing that: (1) the user name associated with the account was Larry Recio; (2) one of the four email addresses associated with the account was larryrecio20@yahoo.com; (3) more than 100 photos of Recio were posted to the account, and (4) one of the photos posted to the user timeline was accompanied by the text “Happy Birthday Larry Recio”).

<sup>15</sup> *United States v. Safavian*, 435 F. Supp. 2d 36, 38 (D.D.C. 2006).

<sup>16</sup> See Jeffrey Bellin and Andrew Guthrie Ferguson, *Judicial Notice in the Information Age*, 108 Nw. U. L.Rev. 1137, 1157 (2014) (“Although much is made of [the authentication] hurdle in the Information Age, it is . . . an easy one to surmount. Success generally depends not on legal or factual arguments, but rather the amount of time and resources a litigant devotes to the problem.”).

<sup>17</sup> Tara Vassefi, “*A Law You’ve Never Heard of Could Help Protect Us From Deceptive Photos and Videos*,” UC Berkeley School of Law Human Rights Center (Nov. 30, 2018), <https://medium.com/humanrightscenter/a-law-youve-never-heard-of-could-help-protect-us-from-fake-photos-and-videos-df07119aaecc>. (noting that Rules 902(13) and (14) “streamlin[e] authentication for those with limited legal resources”).

to treat deepfakes.<sup>18</sup> While a special rule setting forth the grounds for possible authentication of audiovisual evidence runs a similar risk of overlap, perhaps a rule of procedure (such as the requirement of a special showing made to the court, or a notice requirement), or a higher standard of proof, could be useful. It is for the Committee to determine whether it is interested in exploring such a procedural alternative.

## C. Calls for Change

There are several calls for change to the authenticity rules to deal with the rise of deepfakes. This section discusses two suggestions made in law review articles. The third suggestion is from Dr. Grossman and Judge Grimm, and is discussed above in this memo.

### *1. Allocating Responsibility to the Court:*

Professor Rebecca Delfino argues that the danger of deepfakes demands that the judge decide authenticity, not the jury.<sup>19</sup> She contends that “[c]ounteracting juror skepticism and doubt over the authenticity of audiovisual images in the era of fake news and deepfakes calls for reallocating the factfinding authority to determine the authenticity of audiovisual evidence.” She contends that jurors cannot be trusted to fairly analyze whether a video is a deepfake, because deepfakes appear to be genuine, and “seeing is believing.” Professor Delfino suggests that Rule 901 should be amended to add a new subdivision (c), which would provide:

**901(c). Notwithstanding subdivision (a), to satisfy the requirement of authenticating or identifying an item of audiovisual evidence, the proponent must produce evidence that the item is what the proponent claims it is in accordance with subdivision (b). The court must decide any question about whether the evidence is admissible.**

She explains that the new Rule 901(c) “would relocate the authenticity of digital audiovisual evidence from Rule 104(b) to the category of relevancy in Rule 104(a)” and would “expand the gatekeeping function of the court by assigning the responsibility of deciding authenticity issues solely to the judge.”

The proposed rule would operate as follows: After the pretrial hearing to determine the authenticity of the evidence, if the court finds that the item is more likely than not authentic, the court admits the evidence. The court would instruct the jury that it *must accept as authentic* the evidence that the court has determined is genuine. The court would also instruct the jury not to doubt the authenticity, simply because of the existence of deepfakes. This new rule would take the

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<sup>18</sup> For one thing, it is not stare decisis. The Committee has proposed amendments to rules that it rejected in the first instance. The amendments to Rule 106 and new Rule 107 are just two examples. Also, perhaps the dangers of fakery are greater with respect to deepfakes than were presented by digital evidence in 2014.

<sup>19</sup> Rebecca Delfino, *Deepfakes on Trial: A Call to Expand the Trial Judge’s Gatekeeping Role to Protect Legal Proceedings from Technological Fakery*, 74 *Hastings L.J.* 293 (2023).

jury out of the business of determining authenticity, “thereby avoiding the problems invited by juror distrust and doubt.” Finally, “the court would address the threat of counsel exploiting juror doubts over the authenticity of evidence using the deepfake defense by ordering counsel not to make such arguments.”

It should be noted that the Delfino proposal applies to *all* audiovisual evidence --- including the video evidence that courts have been dealing with for about 100 years. Query whether the threat of deepfakes warrants such a dramatic change with respect to all video evidence. Assuming that any amendment is necessary, perhaps the goal is to set out procedures, and higher standards, only after the opponent specifically brings a credible deepfake argument.

Another concern is about how the jury will react when it is instructed to presume authenticity. Given the presence of deepfakes in society, it may well be that jurors will do their own assessment, regardless of the instruction --- and that juror assessment will be done without the foundation for authenticity laid by the proponent in the admissibility hearing. It could become especially confusing when the jury is told that authenticity is a question primarily for jurors when it comes to telephone calls, diaries, and physical evidence, but when it comes to videos --- hands off.

One can argue that the Delfino proposal could productively be cut in half. That is, apply the Rule 104(a) standard to the authenticity of visual evidence, but then allow the jury to make its own assessment --- in other words, to treat the authenticity of visual evidence the same way we treat expert testimony. Delfino would object, though, due to her belief that jurors will not be able to assess the genuineness of the evidence, given that deepfakes are getting better and better. But this half-proposal would at least address arguments that deepfakes will be too easily admitted under the mild standard for showing authenticity to the court.

One final point on the Delfino proposal. Delfino’s idea is that the court is to use the Rule 104(a) standard --- a preponderance of the evidence. Assuming that is appropriate, it should be added to the text of the rule. That is a lesson learned by the Committee in the amendment to Rule 702. This means that the last sentence of the proposal should read something like:

“The court must decide whether it is more likely than not that the item is authentic.”

Such an explication is especially important because the proposal does not actually explicitly say that admissibility is governed by Rule 104(a). It states that “the proponent must produce evidence that the item is what the proponent claims it is in accordance with subdivision (b).” But the illustrations of subdivision (b) are, as discussed above, decided on the less rigorous, *prima facie* proof standard of Rule 104(b).

## ***2. A Corroboration Requirement***

John Lamonaca argues for a more stringent standard of authenticity with respect to deepfakes.<sup>20</sup> He contends that the traditional means of authentication --- by a person with knowledge under Rule 901(b)(1) --- will no longer work with deepfakes because a witness cannot

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<sup>20</sup> John P. Lamonaca, *A Break from Reality: Modernizing Authentication Standards for Digital Video Evidence in the Era of Deepfakes*, 69 Am. U.L. Rev. 1945, 1984 (2020).

reliably testify that the video accurately represents reality. He states that “[b]ecause witnesses will no longer be able to meet the legacy standard of Rule 901(b)(1)’s knowledgeable witness by attesting that a video is a fair and accurate portrayal, courts need to look elsewhere for a sufficient finding that photographic evidence is what its proponent claims it is.” He argues for a proposed new Rule 901(b)(11) that would specifically govern “the unique challenges that digital photography in the modern age present.”

The new Rule 901(b)(11) would provide:

**Before a court admits photographic evidence under this rule, a party may request a hearing requiring the proponent to corroborate the source of information by additional sources.**

Lamonaca explains that the new rule “essentially codifies an existing means of authentication and requires it for photographic evidence.” There is no proposal to change the existing allocation of authority between the court and the jury. Rather, what it essentially does is 1) change the “distinctive characteristics” ground of Rule 901(b)(4) into a foundation *requirement*; and 2) state that the classic ground of authentication under Rule 901(b)(1) --- that the video accurately represents what it purports to show --- is never a sufficient ground of admissibility. Lamonaca concludes that “a preliminary hearing process [requiring corroboration] would bolster the confidence in video evidence for a jury to consider, rather than allowing all photographic evidence to pass the foundational stage with a testimonial witness who lacks the requisite personal knowledge to attest to the evidence’s validity.”

This is an interesting proposal, in that one of the major ways that deepfakes can be *debunked* is actual evidence casting doubt on what is portrayed --- e.g., “the video shows me at the bank but I was in the hospital that day.” So it might not be asking too much for a proponent to provide some corroboration of the event, *if* there is a legitimate question of authenticity. But one major problem is that, like the Delfino proposal, it applies to *all* visual evidence, including video evidence that has been well-handled by the courts for 100 years. It seems unwarranted to require the proponent to go to the expense of providing corroboration for every surveillance video and every wedding photograph, simply because of the potential risk of deepfakes. Courts have not required an advance showing of corroboration for digital evidence, and while deepfakes present new challenges, the case has not been made as yet to justify an automatic corroboration requirement for all photographic evidence.

The better solution is the reverse --- that the court should enter a deepfake inquiry only when the proponent provides some evidence indicating the possibility of a deepfake: either some electronic analysis or a showing through evidence that the event presented is implausible. And then, at that point, the proponent would be required to provide corroboration or some other additional showing before the court can find it authentic. That reverse solution is essentially employed today with regard to electronic evidence--- the “it is hacked” claim is not treated seriously until the opponent comes up with something to indicate that an inquiry is warranted.<sup>21</sup>

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<sup>21</sup> See Grimm, et al, *Authentication of Social Media Evidence*, 36 American Journal of Trial Advocacy 433, 459 (2013) (“A trial judge should admit the evidence if there is plausible evidence of authenticity produced by the proponent of the evidence and only speculation or conjecture—not facts—by the opponent of the evidence about how, or by whom, it ‘might’ have been created.”).

And that solution --- placing the burden of going forward on the opponent--- is what was employed in one of the few court cases that have discussed the deepfake possibility. The Colorado state appeals court in *People v. Gonzales*, 2019 COA 30, ¶ 29 opined that while software has made it easy for laypeople to manipulate recordings, “the fact that the falsification of electronic recordings is always possible does not, in our view, justify restrictive rules of authentication that must be applied in every case *when there is no colorable claim of alteration*.”<sup>22</sup> The court explained that “[w]hen a plausible claim of falsification is made by a party opposing the introduction of a recording, the court may and usually should apply additional scrutiny” to determine whether a reasonable jury could conclude that the item is what it purports to be.

Two more rulemaking points about the Lamonica proposal:

1. It should not be placed as a new Rule 901(b)(11). Rule 901(b) provides examples of authenticated items. This new provision is requiring an extra admissibility requirement for evidence that will be offered under an existing rule --- such as 901(b)(9). It is not a new example of authentication. So it is better placed as separate subdivision, such as Rule 901(c), as is the Grimm-Grossman proposal.

2. The proposed rule refers to “photographic” evidence, which seems too narrow to cover all deepfakes. A term such as “audiovisual” is preferable. The Grimm-Grossman proposal simply ties into Rule 901(b)(9) --- items resulting from a process or system, which is probably the best tie-in to deepfakes.

### ***3. Another View: No Change is Necessary.***

Not all commentators believe that a change to the rules is necessary for dealing with deepfakes. Riana Pfefferkorn notes that the courts have previously handled technological changes under the existing rules, and deepfakes can be handled in the same way.<sup>23</sup> She asserts that the courts are “no stranger to doctored photographs” and that “generations of technologies with truth-subversive potential have become commonplace in society over the years. While the resulting fakes have inevitably gained traction at times in the public consciousness, the sky has not fallen.” She states that “[t]he existence of the mere possibility of manipulation, without more, does not call for a high bar of authentication today any more than it did 150 years ago.” She concludes that “the nation’s courts are robust institutions that have shown themselves capable of handling each new variant of the age-old problem of fakery” and that the courts’ “track record of resilience should assuage” much of the concerns about deepfakes.<sup>24</sup> Pfefferkorn’s view is that the rise of deepfakes

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<sup>22</sup> See also Shannon Bond, *People are trying to claim real videos are deepfakes. The courts are not amused*, <https://www.npr.org/2023/05/08/1174132413/people-are-trying-to-claim-real-videos-are-deepfakes-the-courts-are-not-amused> (noting that courts in the January 6 prosecutions have rejected out of hand broad, unsupported claims that videos could be deepfakes).

<sup>23</sup> Riana Pfefferkorn, *Deepfakes in the Courtroom*, 29 Public Interest Law Journal 245, 259 (2020)

<sup>24</sup> See also Russell Brandom, *Deepfake Propaganda is not a Real Problem*, THE VERGE (Mar. 15, 2019), <https://www.theverge.com/2019/3/5/18251736/deepfake-propaganda-misinformation-troll-video-hoax> (“We’ve had the tools to fabricate videos and photos for a long time. . . . AI tools can make that process easier and more accessible, but it’s easy and accessible already. . . . [D]eepfakes are already in reach for anyone who wants to cause trouble on the internet. It’s not that the tech isn’t ready yet. It just isn’t useful.”); Jeffrey Westling, *Deep Fakes: Let’s Not Go Off the*

will probably increase the costs of authentication, perhaps by requiring expert testimony in more cases than previously. But that does not mean that the rules need to be amended.

Similarly, Grant Fredericks, the president of Forensic Video Solutions and a pioneer in the field of deepfake technology, is confident that fake videos will be kept out of evidence, both because they can be discovered using the advanced tools of his trade and because the video's proponent would be unable to answer basic questions to authenticate it (who created the video, when, and with what technology).<sup>25</sup>

## **D. Conclusion**

It is for the Committee to decide whether it is necessary to develop a change to the Evidence Rules in order to deal with deepfakes. If some rule is to be proposed, it probably should not be a specific rule setting forth the methods in which visual evidence can be authenticated --- as those methods are already in Rule 901, and the overlap would be problematic. Possibly more productive solutions include heightening the standard of proof, or requiring an additional showing of authenticity --- but only after some showing by the opponent has been made. But any possible change must be evaluated with the perspective that the authenticity rules are flexible, and have been flexibly and sensibly applied by the courts to treat other forms of technological fakery.

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Deep End, TECHDIRT (Jan. 30, 2019), <https://www.techdirt.com/articles/20190128/13215341478/deep-fakes-lets-not-gooff-deep-end.shtml>.

<sup>25</sup> Mark J. Pescatore, Forensic Video Experts: Fake Videos Not Threat to Courtroom Evidence, PIPELINE COMM. (June 24, 2019), <https://www.pipcomm.com/2019/06/24/forensic-video-experts-fake-videos-not-threat-to-courtroom-evidence/>.

# TAB 1B



(L)

## SHARE



# ARTIFICIAL INTELLIGENCE, EXPLAINED

## In This Story

*By Jennifer Monahan*



**Prof. Rayid  
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Expert in AI,

Many of us are familiar the way artificial intelligence (AI) is already integrated into our daily lives: Spotify recommends new songs that we love, Google Maps provides faster routes for our morning commute, or Alexa sounds an alarm to remind us when it's time to leave for an appointment. Each of these examples is an instance of AI in action, and we've become accustomed to their existence.

So why the current hype cycle around AI? What's different now?

The most recent iterations of AI – called “generative” AI – can do things that look, sound, and feel eerily human.

## WHY IT MATTERS

AI has the potential to transform various industries, from finance and education to transportation and healthcare. AI can automate repetitive tasks, improve decision-making processes, and enhance the accuracy and speed of data analysis.

While the potential benefits are enormous, AI presents significant ethical and societal concerns (<https://www.heinz.cmu.edu/media/2023/July/generative-ai-is-a-math-problem-left-unchecked-it-could-be-a-real-problem>). Like any tool, AI can be used for good or harm. Carnegie Mellon University's Block Center for Technology and Society (<https://www.cmu.edu/block-center/about-us/index.html>) was created to explore how technology can be leveraged for social good.

As of now, only a few technology super-companies have the capacity to create large-scale generative AI tools. The systems require massive amounts of both computing power and data. By default, a few people who lead these organizations are making decisions about the use of AI that will have widespread consequences for society. It behooves the rest of us to recognize the moment we're in, and to engage in shaping the path forward.

## **SOME BASIC HISTORY AND DEFINITIONS... WHAT AI IS**

Alan Turing, one of the founders of AI, suggested in 1950 that if a machine can have a conversation with a human and the human can't distinguish whether they are conversing with another human or with a machine, the machine has demonstrated human intelligence.

Machine learning (ML) first entered the public consciousness in the 1950s, when television viewers watched a demonstration of Arthur Samuel's Checkers program defeating its human opponent, Robert Nealy. For a long time, though, AI remained largely confined to the realm of tech geniuses and science fiction enthusiasts.

Those tech geniuses accomplished a number of groundbreaking achievements over the last seven decades, including:

## A TIMELINE

- In **1956**, Allen Newell, Herbert Simon (<https://www.library.cmu.edu/about/news/2023-07/herb-simon-allen-newell-ai-cmu>), and J.C. Shaw developed Logic Theorist, the first artificially intelligent computer program. They were part of a small group that coined the term “artificial intelligence.” (<https://www.cmu.edu/simon/what-is-simon/history.html>)



*Pictured above, left, **Herbert Simon** joined the CMU faculty in 1949 and helped create several of the University's departments and schools. **Allen Newell**, pictured right (circa 1970), earned a doctorate in Industrial Administration (1957) at the Carnegie Institute of Technology and later co-founded CMU's Computer Science Department.*

- In **1957**, Frank Rosenblatt developed the Perceptron, an early artificial neural network that recognized patterns.
- In **1965**, Joseph Weizenbaum developed

## COMMON TERMS

The terminology around AI can be intimidating. Here's a glossary of key terms you'll often hear when people talk about AI.

**Algorithm:** a set of rules or instructions that tell a machine what to do with the data input into the system.

**Deep Learning:** a method of machine learning that lets computers learn in a way that mimics a human brain, by analyzing lots of information and classifying that information into categories. Deep learning relies on a neural network.

**Hallucination:** a situation where an AI system produces fabricated, nonsensical, or inaccurate information. The wrong information is presented with confidence, which can make it difficult for the human user to know whether the answer is reliable.

**Large Language Model (LLM):** a computer program that has been trained on massive amounts of text data such as books, articles, website content, etc. An LLM is designed to understand and generate human-like text

ELIZA, the first chatbot; the system used limited natural language processing.

- **1960s and 70s:** AI enters mainstream pop culture:
  - "2001: A Space Odyssey" premiered in movie theaters (1968).
  - C-3PO and R2-D2 are introduced to the world via "Star Wars: A New Hope" (1977).
  - Speak & Spell ([https://www.amazon.com/Basic-Fun-Speak-Spell-Electronic/dp/B07PQT8D-MB/ref=sr\\_1\\_1\\_sspa?keywords=speak+and+spell&qid=1686249485&sr=8-1-spons&psc=1&spLa=ZW5jcmlwdGVkUXVhbGlmaWVyPUExRTRXR1dXRUNVUkpEJmVuY3J5cHRIZElkPUewNTU5MDAyTFVSUVRUTFITNk8yJmVuY3J5cHRIZEFkSWQ.9QTA3MjQyOTFWRUFUV1c5TENTVDcmd2lkZ2V0TmFtZT1zcF9hdGYmYWN0aW9uPWNsaWNrUmVkaXJlY3QmZG9Ob3RMb2dDbGlja z10cnVI](https://www.amazon.com/Basic-Fun-Speak-Spell-Electronic/dp/B07PQT8D-MB/ref=sr_1_1_sspa?keywords=speak+and+spell&qid=1686249485&sr=8-1-spons&psc=1&spLa=ZW5jcmlwdGVkUXVhbGlmaWVyPUExRTRXR1dXRUNVUkpEJmVuY3J5cHRIZElkPUewNTU5MDAyTFVSUVRUTFITNk8yJmVuY3J5cHRIZEFkSWQ.9QTA3MjQyOTFWRUFUV1c5TENTVDcmd2lkZ2V0TmFtZT1zcF9hdGYmYWN0aW9uPWNsaWNrUmVkaXJlY3QmZG9Ob3RMb2dDbGlja z10cnVI)) toy hits the shelves (1978).
- **1974 - 1980:** The first "AI winter" is a period of decreased funding and consequently slowed

based on the patterns and information it has learned from its training. LLMs use natural language processing (NLP) techniques to learn to recognize patterns and identify relationships between words. Understanding those relationships helps LLMs generate responses that sound human—it's the type of model that powers AI chatbots such as ChatGPT.

**Machine Learning (ML):** a type of artificial intelligence that uses algorithms which allow machines to learn and adapt from evidence (often historical data), without being explicitly programmed to learn that particular thing.

**Natural Language Processing (NLP):** the ability of machines to use algorithms to analyze large quantities of text, allowing the machines to simulate human conversation and to understand and work with human language.

**Neural Network:** a deep learning technique that loosely mimics the structure of a human brain. Just as the brain has interconnected neurons, a neural network has tiny interconnected nodes that work together to

research in AI.

- In **1981**, the government of Japan allocated \$850 million for the Fifth Generation Computer project; the goal was to create systems that could engage in conversation and reason like a human.
- In **1984**, NAVLab developed the first autonomous land vehicle.
- The second AI winter occurred between **1987 - 1993**.
- In **1997**, Deep Blue beat world chess champion Gary Kasparov.
- In **2011**, IBM's Watson defeated Ken Jennings on *Jeopardy* and Apple added Siri to its iPhones.

process information. Neural networks improve with feedback and training.

**Token:** the building block of text that a chatbot uses to process and generate a response. For example, the sentence "How are you today?" might be separated into the following tokens: ["How," "are," "you," "today," "?"]. Tokenization helps the chatbot understand the structure and meaning of the input.

AI refers to the ability of machines and computers to perform tasks that would normally require human intelligence. These tasks include things like recognizing patterns and making predictions. Ultimately, that's not magic; it's math.

To understand what's going on with AI today, it's helpful to think of AI in phases of development. Early AI systems were machines that received an input – the data they were fed by humans - and then produced a recommendation. That response is based on the way the system was trained, and the algorithms (the math!) that tell the system what to do with the data. It's computers that can play checkers or chess. It's Netflix knowing that you loved

"Karate Kid" and suggesting that you watch "Cobra Kai."

## HOW GENERATIVE AI WORKS

Generative AI is a step forward in the development phase. Instead of just reacting to data input, the system takes in data and then uses predictive algorithms (a set of step-by-step instructions) to create original content. In the case of a large language model (LLM), that content can take the form of original poems, songs, screenplays, and the like produced by AI chatbots such as ChatGPT and Google Bard. The "large" in LLMs indicates that the language model is trained on a massive quantity of data. Although the outcome makes it seem like the computer is engaged in creative expression, the system is actually just predicting a set of tokens and then selecting one.

"The model is just predicting the next word. It doesn't understand," explains Rayid Ghani (<https://www.heinz.cmu.edu/faculty-research/profiles/ghani-rayid>), professor of machine learning at Carnegie Mellon University's Heinz College of Information Systems and Public Policy. "But as a user playing around with it, it seems to have amazing capabilities, while having very large blind spots."

Models like ChatGPT are programmed to select the next token, or word, but not necessarily the most commonly used next word. Chatbots might choose – for example – the fourth most common word in one attempt. When the user submits the exact same prompt to the chatbot the next time, the chatbot could randomly select the *second* most common word to complete the statement. That's why we humans can ask a chatbot the same question and receive slightly different responses each time.

Tools like Copilot and ChatGPT use that token process to write computer code. Though not always perfect, the initial consensus in the tech industry suggests that these tools can save coders hours of tedious work.

Text-to-image models like DALL-E and Stable Diffusion work similarly. The program is trained on lots and lots of pictures and their corresponding descriptions. It learns to recognize patterns and understand the relationships between words and visual

elements. So when you give it a prompt that describes an image, it uses those patterns and relationships to generate a new image that fits the description. As a result, these models can create never-before-seen art. A prompt for “Carnegie Mellon University Scotty Dog dancing, in the style of pointillism” produced this fun gem:



Philosophers, artists, and creative types are actively debating whether these processes constitute creativity or plagiarism.

## **WHAT AI IS *NOT***

Despite the now famous [creepy conversation](https://www.nytimes.com/2023/02/16/technology/bing-chatbot-microsoft-chatgpt.html?smid=url-share) (between *New York Times* writer Kevin Roose and Microsoft’s Bing chatbot, we have not yet entered the phase of sentient AI – or artificial general intelligence (AGI). AGI is still a theoretical idea. Unlike generative AI, which seems to be able to do some of the things humans do,

AGI systems would actually mimic or surpass human intelligence. Machines would become self-aware and have consciousness. And if you buy into the premise of movies like "Terminator" or "The Matrix," things go south for the human race rather quickly after that. To be clear, that's not where we are today.

AI is also not infallible. Large language models like Bard and ChatGPT have an interesting flaw – sometimes they hallucinate. As in, a user enters a prompt and the system makes up an answer that's not true in some way. The system might produce an intelligent-sounding essay explaining photosynthesis, and cite as its source a scholarly research paper that doesn't actually exist. Sometimes the answer is just inaccurate. To complicate matters, the information is presented with confidence and authority; it looks and sounds legitimate.

"You can imagine a physician prompting an AI chatbot to list drugs that have recently been found useful for a particular disease," explained Ghani. "The model is designed to produce a response that sounds realistic, but it's not designed to produce factually correct information. It would produce a list of drugs. They might be real; they might be made up. While a physician may have the training and background to separate real from fake, a patient may not be able to do so if given access to such a tool." You can see the problem.

AI is not inherently fair and just. LLMs are trained on large quantities of data, much of which is scraped from the Internet. That data includes reliable sources right alongside the hate-speech and other sewage that lives in the depths of social media platforms. Technologists have put in some protections – asking ChatGPT to tell a sexist joke elicits the following response:

*I'm sorry, but I'm programmed to follow ethical guidelines, and that includes not promoting or sharing any form of sexist, offensive, or discriminatory content. I'm here to help answer questions, engage in meaningful conversations, and provide useful information. If you have any non-offensive questions or topics you'd like to discuss, please feel free to ask.*

Humans employing more creative prompts can often circumvent the protections in the AI chatbots. And sometimes the AI system



itself is biased, as in the case of [hiring tools](https://ai100.stanford.edu/2021-report/standing-questions-and-responses/sq10-what-are-most-pressing-dangers-ai) (<https://ai100.stanford.edu/2021-report/standing-questions-and-responses/sq10-what-are-most-pressing-dangers-ai>) that discriminate against women or facial recognition software that [doesn't recognize people of color](https://www.ted.com/talks/joy_buolamwini_how_i_m_fighting_bias_in_algorithms/transcript) ([https://www.ted.com/talks/joy\\_buolamwini\\_how\\_i\\_m\\_fighting\\_bias\\_in\\_algorithms/transcript](https://www.ted.com/talks/joy_buolamwini_how_i_m_fighting_bias_in_algorithms/transcript)). Bias inherent in an AI model has the potential to exacerbate existing injustice.

## MOVING FORWARD

AI is changing the way we live, work, and interact with machines. When all that's at stake is our Spotify playlist or which Netflix show we watch next, understanding how AI works is probably not important for a large percentage of the population. But with the advent of generative AI into mainstream consciousness, it's time for all of us to start paying attention and to decide what kind of society we want to live in.

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# TAB 1C

## MACHINE LEARNING EVIDENCE: ADMISSIBILITY AND WEIGHT

*Patrick W. Nutter\**

### INTRODUCTION

Artificial intelligence (“AI”) is gaining traction in legal practice. How prosecutors prioritize which crimes to prosecute,<sup>1</sup> sift through mountains of documents,<sup>2</sup> and establish reasonable suspicion<sup>3</sup> can all reasonably be expected to change with coming AI technologies. While lawyers need not attain expert-level knowledge of these processes, some competency in concepts and vocabulary will be essential, in the same manner it has been with other sciences, like statistical evidence or DNA analysis. In that vein, this Comment aims to give attorneys a much-needed look inside the “black box” of one emerging type of AI technology, machine learning. With at least some familiarity with how machine learning works, attorneys can begin to formulate questions and strategies when that kind of technology produces substantive evidence at trial. These include potential issues under the Fifth and Sixth Amendments as well as the Federal Rules of Evidence, none of which, I argue, would categorically bar machine learning evidence. After establishing that machine learning evidence is admissible, I explain how counsel for both sides must be aware of the significant issues with machine learning that nonetheless could affect the weight such evidence is assigned by the trier of fact.

Machine learning refers to a process in which a “machine has been ‘trained’ through exposure to a large quantity of data and infers a rule from the patterns it observes.”<sup>4</sup> The technology, once only theoretical, is now

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<sup>1</sup> See Andrew Guthrie Ferguson, *Predictive Prosecution*, 51 WAKE FOREST L. REV. 705, 732 (2016) (“[T]he predictive prosecution model shifts the identification of problem areas from the street cops to the lawyers.”).

<sup>2</sup> Harry Surden, *Machine Learning and Law*, 89 WASH. L. REV. 87, 110–15 (2014).

<sup>3</sup> See Stephanie Lacambra, *Predictive Policing: A Guide for Criminal Defense Attorneys*, ELEC. FRONTIER FOUND., [https://www.eff.org/files/2017/10/30/predictive\\_policing\\_one\\_pager.pdf](https://www.eff.org/files/2017/10/30/predictive_policing_one_pager.pdf) (last visited Mar. 7, 2018) (defining and explaining the use of “predictive policing” by law enforcement).

<sup>4</sup> Joshua A. Kroll et al., *Accountable Algorithms*, 165 U. PA. L. REV. 633, 679 (2017).

responsible for many tasks in daily digital life. For instance, machine learning is at work when Facebook automatically recognizes a user in a photo<sup>5</sup> or when an email client automatically routes spam to the appropriate folder.<sup>6</sup>

For many litigators, it will only be a matter of time before they first encounter a creative opposing counsel who wishes to admit machine learning output into evidence. When that happens, both sides in the interests of clients—and the court in the interest of the law itself—must be equipped with certain questions and skepticism. This Comment aims to look ahead to possible evidentiary issues when, not if, the output of machine learning algorithms is used as substantive evidence in criminal prosecution.

In the very near future, AI software will affect criminal and civil litigation in at least three significant ways. First, AI will pose the critical question of whether and to what extent the decision of the algorithm exposes the user to liability.<sup>7</sup> For example, in the employment context, when an algorithm prescreens resumes and, not by intentional design, discounts the resumes of women or minorities, is the employer liable for discrimination?<sup>8</sup> Or, since the technology will soon be deployed on police body cameras,<sup>9</sup> could real-time object recognition software perhaps assist an officer by identifying whether a gun or a smartphone is in the suspect's hand, and what liability might exist if the algorithm decided incorrectly?<sup>10</sup> Second, AI will also alter predictive technologies in the criminal justice system, such as ones that may

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<sup>5</sup> See Daniel Terdiman, *Facebook's Image-Recognition Tech Is Teaching 40,000 Images a Second to Understand Context*, FAST CO., (June 8, 2017), <https://www.fastcompany.com/40428910/facebooks-image-recognition-tech-is-teaching-40000-images-a-second-to-understand-context> (“For [Facebook’s] 1.94 billion monthly users, artificial intelligence and machine learning are behind the ability to quickly surface meaningful baby pictures, vacation selfies, and pet action photos.”).

<sup>6</sup> See Surden, *supra* note 2, at 90–93 (discussing email spam filters as an example of machine learning).

<sup>7</sup> See generally Rebecca J. Krystosek, *The Algorithm Made Me Do It and Other Bad Excuses: Upholding Traditional Liability Principles for Algorithm-caused Harm*, MINN. L. REV. DE NOVO (May 17, 2017), <http://www.minnesotalawreview.org/2017/05/the-algorithm-made-me-do-it-and-other-bad-excuses/> (discussing various forms of legal liability for the actions and decisions of algorithms).

<sup>8</sup> See Hannah Devlin, *AI Programs Exhibit Racial and Gender Biases, Research Reveals*, GUARDIAN (Apr. 13, 2017, 2:00 PM), <https://www.theguardian.com/technology/2017/apr/13/ai-programs-exhibit-racist-and-sexist-biases-research-reveals> (“One previous study showed that an identical CV is 50% more likely to result in an interview invitation if the candidate’s name is European American than if it is African American. The latest results suggest that algorithms, unless explicitly programmed to address this, will be riddled with the same social prejudices.”).

<sup>9</sup> See Drew Harwell, *Facial Recognition May Be Coming to a Police Body Camera Near You*, WASH. POST (Apr. 26, 2018), [https://www.washingtonpost.com/news/the-switch/wp/2018/04/26/facial-recognition-may-be-coming-to-a-police-body-camera-near-you/?utm\\_term=.46192f40bfda](https://www.washingtonpost.com/news/the-switch/wp/2018/04/26/facial-recognition-may-be-coming-to-a-police-body-camera-near-you/?utm_term=.46192f40bfda) (describing the growing use of facial recognition software in police body cameras).

<sup>10</sup> See, e.g., Eric Levenson, Madison Park & Darran Simon, *Sacramento Police Shot Man Holding Cellphone in His Grandmother’s Yard*, CNN (Mar. 22, 2018) <https://edition.cnn.com/2018/03/22/us/sacramento-police-shooting/index.html> (reporting a shooting of a man holding a cell phone by an officer who believed the phone to be a gun).

aid in investigations, establish reasonable suspicion or probable cause,<sup>11</sup> or assist sentencing judges in estimating a defendant’s chances of reoffending.<sup>12</sup> Third, AI can aid the legal reasoning process itself. For example, to understand the original public meaning of the Second Amendment’s “bear arms,” it would surely be illuminating to examine a corpus of 1.3 billion words—from books, handwritten diaries, newspapers, etc.—for the use of the phrase “bear arms” in the centuries surrounding the Amendment’s drafting, a task that has been accomplished with AI technology.<sup>13</sup>

Despite the important developments and commentary on those evolving issues, this Comment focuses specifically on using the conclusions of machine learning processes as substantive evidence in litigation. For instance, in a blurry surveillance video or an unclear audio recording, the naked eye and ear may be insufficient to prove guilt beyond a reasonable doubt, but certain recognition algorithms could do so easily. Lip-reading algorithms might tell jurors what was said on video where there is no audio available.<sup>14</sup> A machine might construct an estimation of a perpetrator’s face from only a DNA sample,<sup>15</sup> or in other DNA analysis of corrupted samples.<sup>16</sup>

<sup>11</sup> See generally Michael L. Rich, *Machine Learning, Automated Suspicion Algorithms, and the Fourth Amendment*, 164 U. PA. L. REV. 871 (2016) (discussing the role of machine learning will play in the Fourth Amendment context).

<sup>12</sup> See Ellora Thadaney Israni, Opinion, *When an Algorithm Helps Send You to Prison*, N.Y. TIMES (Oct. 26, 2017), <https://www.nytimes.com/2017/10/26/opinion/algorithm-compas-sentencing-bias.html> (criticizing the use of a risk assessment algorithm as a factor in a criminal sentencing).

<sup>13</sup> See Johnson, *Arms and the Man*, ECONOMIST (June 9, 2018), <http://media.economist.com/news/books-and-arts/21743640-big-data-can-help-clarify-meaning-second-amendment-judges-should-pay> (advocating for the use of “digital corpora” to determine the meaning of the term “bear arms”).

<sup>14</sup> See Jamie Condliffe, *AI Has Beaten Humans at Lip-reading*, MIT TECH. REV. (Nov. 21, 2016), <https://www.technologyreview.com/s/602949/ai-has-beaten-humans-at-lip-reading/> (describing two studies in which artificial intelligence vastly outperformed humans at lip-reading).

<sup>15</sup> The leading company offering this particular service is Virginia-based Parabon Nanolabs, which uses machine learning processes to predict visible traits (e.g., facial structure, eye and hair color, etc.) from DNA samples alone. See *How DNA Phenotyping Works*, PARABON NANOLABS, <https://snapshot.parabon-nanolabs.com/#phenotyping-how> (last visited Mar. 7, 2018) (“Parabon’s scientists use machine learning algorithms to combine the selected set of SNPs into a complex mathematical equation for the genetic architecture of the trait.”). Parabon’s service has already been used in several investigations. See, e.g., Alicia Victoria Lozano, *Montgomery County Officials Use DNA Samples to Create Picture of Rape Suspect*, NBC PHILA. (Jan. 16, 2018, 3:12 PM), <https://www.nbcphiladelphia.com/news/local/Montgomery-County-Phenotyping-DNA-Testing-Rape-Suspect-Norristown-Farm-Park-469588793.html> (last updated Jan. 16, 2018, 7:29 PM)(discussing the Montgomery County District Attorney Office’s use of Parabon’s DNA technology to create an illustration of a suspected rapist). It is, however, not without critics. One, Peter Claes, an expert in craniofacial morphometrics at the University of Leuven, thinks that in some cases the images have virtually no value. To him, one image “just looked like an average black man. It didn’t have any characteristic features. That reconstruction didn’t give any more information than the genetic background that they listed. This prediction is hardly specific so it doesn’t really focus on an individual . . . .” Howard Wolinsky, *CSI on Steroids*, 16 EMBO REP. 782, 782 (2015).

<sup>16</sup> See *Under the Microscope—Jonathan Adelman & Michael Marciano*, ISHI (Sept. 21, 2017),

The legal issues of broadly defined “machine evidence” have been extensively cataloged and discussed, especially in the Fourth and Sixth Amendment contexts.<sup>17</sup> Such machine evidence includes radar guns, breathalyzers, DNA analysis software, GPS, and risk assessment software.<sup>18</sup> However, few have explored machine learning as a distinct species of machine evidence, distinct even from evidence produced using traditional computer programs,<sup>19</sup> with its own vocabulary and unique set of issues. Importantly, that lack of analysis means there has been little exploration of the legal pitfalls of machine learning—the ways in which it goes awry, is misused, or is misinterpreted. In some ways, the reliability issues of machine learning algorithms are similar to those already cataloged with respect to typical computer software; but in other critical respects, machine learning poses unique questions of reliability. Like other machine evidence has done in the past, machine learning will give rise to new evidentiary issues. Ultimately, however, I argue that in most cases machine learning evidence will not be barred by either the Federal Rules of Evidence or the Fifth and Sixth Amendments to the Constitution.

Part I begins with an overview of how courts currently treat software output as evidence. Machine learning is revolutionary in its applications and capabilities, though, with respect to its potential uses in prosecution, it is functionally similar to traditional software: data go in and conclusions come out. In between, there is a “black box” of calculations that few in the courtroom understand. Part II explains how machine learning is distinct from traditional computer software in process and appropriate uses. Part III offers an explanation of how contemporary machine learning typically works.

In Part IV, I analyze machine learning evidence under Federal Rule 702 and its *Daubert* criteria and find that machine learning would surely meet the requirements for admissible expert testimony.

In Part V, I argue that the Fifth and Sixth Amendments pose no categorical barrier to machine learning evidence but limit how it may be introduced. I argue first that the Fifth Amendment’s Due Process Clause does not bar machine learning evidence and, second, that pursuant to the Sixth Amendment’s Confrontation Clause, machine learning evidence will

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[https://www.ishinews.com/under-the-microscope-michael-marciano\\_jonathan\\_adelman/](https://www.ishinews.com/under-the-microscope-michael-marciano_jonathan_adelman/) (interviewing two experts on the issues of DNA mixture interpretation).

<sup>17</sup> See generally Andrea Roth, *Machine Testimony*, 126 YALE L.J. 1972 (2017) [hereinafter Roth, *Testimony*] (attempting to “offer a coherent framework for conceptualizing and regulating machine evidence”); Andrea Roth, *Trial by Machine*, 104 GEO. L.J. 1245 (2016) [hereinafter Roth, *Trial*] (discussing the rise of machines in criminal adjudication).

<sup>18</sup> Roth, *Testimony*, *supra* note 17, at 2015, 2025, 2027.

<sup>19</sup> See Christian Chessman, Note, *A “Source” of Error: Computer Code, Criminal Defendants, and the Constitution*, 105 CALIF. L. REV. 179, 183–84 (2017) (discussing evidentiary issues with respect to conventional computer software).

likely only be admissible in the form of expert testimony.

In Part VI, having concluded that machine learning evidence will likely be admissible in at least some cases, I emphasize that there are significant problems with the weight such evidence should be assigned by the finder of fact because of machine learning's unique unexplainability, that is, in many cases it is impossible to explain how a machine learning algorithm makes a particular conclusion.

## I. MACHINE EVIDENCE AND BLACK BOXES

Evidence is “[s]omething (including testimony, documents, and tangible objects) that tends to prove or disprove the existence of an alleged fact” or, more generally, “anything presented to the senses and offered to prove the existence or nonexistence of a fact.”<sup>20</sup> In a criminal proceeding, evidence, and the inferences that logically can be drawn from it, must ultimately support the factfinder’s conclusion of guilt.<sup>21</sup> The primary purpose of rules of evidence is to narrow the evidence offered at trial, sometimes to limit evidence to what is relevant and probative, other times to prevent the factfinder from drawing illogical conclusions or to minimize the possibility of unfair prejudice to the accused.<sup>22</sup> Where the Federal Rules of Evidence apply, they explicitly instruct courts to construe them in a manner that will “administer every proceeding fairly, eliminate unjustifiable expense and delay, and promote the development of evidence law, to the end of ascertaining the truth and securing a just determination.”<sup>23</sup>

How guilt may be established has evolved over the course of the Anglo-American legal tradition. Whereas documentary evidence and human testimony have been mainstays of criminal proceedings, other forms of evidence have unfortunately come and thankfully gone, including phrenology<sup>24</sup> and “spectral evidence” (i.e., the “testimony of the bewitched

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<sup>20</sup> *Evidence*, BLACK’S LAW DICTIONARY (10th ed. 2014).

<sup>21</sup> 1 WHARTON’S CRIMINAL EVIDENCE § 1:2 (15th ed. 1997)

<sup>22</sup> *Id.*

<sup>23</sup> FED. R. EVID. 102.

<sup>24</sup> In the latter half of the nineteenth century, Cesare Lombroso formulated and evangelized his own “scientific” classification of criminals and testified often as an expert witness:

He noticed in the skull of a murderer an anomalous depression characteristic of lower species, such as dogs. . . . Lombroso speculated that such a skull reflected an underlying brain abnormality of an atavistic nature. That is, perhaps the brain of the murderer suggested a more primitive development of a lower species. Lombroso gathered large quantities of data from measurements on criminals and proposed that certain criminals represented a distinct species, *homo delinquens*. As his reputation grew, others also subscribed to his theory that at least some criminals are born, not made, and criminal types could be identified by the shapes of their skulls. Lombroso was called upon as an expert witness on numerous occasions to testify as to whether a defendant was of a criminal disposition.



that an accused person's spectral shape appeared to them at a time when their physical body was elsewhere").<sup>25</sup> "Machine evidence," however, has come and stayed. Over the past 150 years, the "silent testimony of instruments" has supplemented the testimony of humans.<sup>26</sup> Only rarely have courts found that science had progressed too far beyond what the given rules of evidence can comfortably handle and thus resisted a new technology as evidence.<sup>27</sup> Instead, the law has typically been receptive to new scientific discoveries and their potential evidentiary uses.<sup>28</sup>

Overall, "this shift from human- to machine-generated proof has, on the whole, enhanced accuracy and objectivity in fact finding."<sup>29</sup> And yet, for all its advantages, machine testimony is not without risks, such as when society determines that it must err on the side of overinclusion and reduction of false negatives, notwithstanding such a policy's inherent risk that machines will erroneously inculcate the innocent.<sup>30</sup> This Comment highlights that risk, as well as another: that machines are improperly afforded a presumption of reliability, even when jurors cannot peer into the "black box" that is providing them with evidence. "These 'black box' processes, because of their mechanical appearance and apparently simple output, have a veneer of objectivity and certainty."<sup>31</sup> However, even though these machines appear neutral, they are necessarily the product of human creation, and therefore human judgment, with its risk of bias and tendency to make mistakes.<sup>32</sup>

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Richard L. Elliott, *Neuropsychiatry in the Courtroom*, 62 MERCER L. REV. 933, 939 (2011).

- <sup>25</sup> See Sarah Krueger, *The Devil's Specter: Spectral Evidence and the Salem Witchcraft Crisis*, 2 SPECTRUM: A SCHOLARS DAY J., 1, 1 (2011) ("This was a key point of proof delivered against accused witches at Salem in 1692. Spectral evidence is impossible to prove and courts used it with caution in court cases prior to Salem. . . . [Y]et nearly every case during the Salem outbreak featured this evidence.").
- <sup>26</sup> Roth, *Trial*, *supra* note 17, at 1253 (quoting MIRJAN R. DAMAŠKA, EVIDENCE LAW ADRIFT 143 (1997)); see *id.* ("[S]cientific gadgets in the law of evidence' and interpretive forensic and diagnostic software has reduced the role of both percipient and human witnesses in proving guilt." (quoting Note, *Scientific Gadgets in the Law of Evidence*, 53 HARV. L. REV. 285, 285 (1939) [hereinafter *Scientific Gadgets*])).
- <sup>27</sup> See, e.g., *People v. Offermann*, 125 N.Y.S.2d 179, 185 (N.Y. Sup. Ct. 1953) (explaining that the case was the very first to use a radar gun reading as evidence and holding that the New York legislature should enact new rules of evidence to explicitly allow for its admissibility).
- <sup>28</sup> *Scientific Gadgets*, *supra* note 26, at 285 ("It is the perennial boast of the law that in the ascertainment of facts it will avail itself of any accepted scientific discovery.").
- <sup>29</sup> Roth, *Testimony*, *supra* note 17, at 1976.
- <sup>30</sup> Roth, *Trial*, *supra* note 17, at 1269 ("[M]echanization has arisen in criminal justice in an unbalanced way, reflecting the focus of law enforcement, interest groups, and lawmakers on reducing a particular species of inaccuracy: false negatives.").
- <sup>31</sup> *Id.* at 1269–70.
- <sup>32</sup> *Id.* at 1270 ("In truth, these processes all have hidden subjectivities and errors that often go unrecognized and unchecked, thus potentially 'facilitat[ing] the masking of illegitimate or illegal discrimination behind layers upon layers of mirrors and proxies.' (quoting Omer Tene & Jules Polonetsky, *Judged by the Tin Man: Individual Rights in the Age of Big Data*, 11 J. TELECOMM. & HIGH TECH. L. 351, 358 (2013)).

Even so, machine evidence—and, for the purposes of this Comment, specifically evidence derived from algorithmic software processes—supports guilty verdicts daily. By their conduct, courts have expressed a tolerance for some level of both ignorance and risk in machine evidence: ignorance in how these processes work, and risk that they might not “get it right” every time. For example, photographic evidence, breathalyzer readouts, and DNA tests have been admitted into evidence for decades, in spite of their risk of error in programming or hidden reliance on subjective human judgment.<sup>33</sup> In recent cases involving TrueAllele, a probabilistic genotypic software,<sup>34</sup> the black box has only gotten blacker, and courts have yet to reject its use on that basis. Indeed, TrueAllele’s most marketable feature is the assumptions it uses to *remove* user (that is, lab technician) judgment from the DNA match determination, effectively promoting its “vener of objectivity and certainty.” This merely passes the buck, however, as the user’s judgment is only substituted for that of the initial programmer of the software, who, as of now, has never revealed his complete methodology and has not been subject to cross-examination.<sup>35</sup>

Overall, then, courts have long been comfortable with machine evidence whose processes are not entirely disclosed to, or understood by, the judge, jury, parties, or counsel. And it is likely that courts will find similar comfort in machine learning processes.

## II. WHAT MACHINE LEARNING IS

### A. *Machine Learning in the Artificial Intelligence Context*

Technologies that claim the artificial intelligence label are proliferating in number and application. A 2016 Stanford University report lists no fewer than eight broad sectors that researchers are hoping to transform with AI, including critical areas like education, healthcare, transportation, the workplace, and public safety.<sup>36</sup> Yet for many AI researchers, listing even eight sectors is too

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<sup>33</sup> *Id.* at 1272–73 (discussing the potential errors and human judgments that inform how photographs, breathalyzers, and DNA tests operate).

<sup>34</sup> Probabilistic genotyping “uses complex mathematical formulas to examine the statistical likelihood that a certain genotype comes from one individual over another.” Jessica Pishko, *The Impenetrable Program Transforming How Courts Treat DNA Evidence*, WIRED (Nov. 29, 2017, 7:00 AM), <https://www.wired.com/story/trueallele-software-transforming-how-courts-treat-dna-evidence>.

<sup>35</sup> Roth, *Trial*, *supra* note 17, at 1273–74.

<sup>36</sup> COMMITTEE OF THE ONE HUNDRED YEAR STUDY OF ARTIFICIAL INTELLIGENCE, STUDY PANEL, ARTIFICIAL INTELLIGENCE AND LIFE IN 2030, at 4 (2016).

conservative: AI will simply transform everything.<sup>37</sup> To them, that future is “when,” not “if.” The necessary technologies are already here, but their wider applications are presently constrained only by human imagination, management,<sup>38</sup> and the sheer lack of people working in the field.<sup>39</sup>

AI has infected the discourse of business and culture perhaps because it seems to refer to so many things. Firms increasingly market themselves as incorporating AI into their products and services,<sup>40</sup> though sometimes they use the AI label inaccurately, applying its traditional computational methods only for more marketing heft.<sup>41</sup> More often, the term is used in platitudes about market “disruption,”<sup>42</sup> and in fact “AI” may now be used so loosely that it is losing its meaning—what one Georgia Institute of Technology professor calls “AI deflation.”<sup>43</sup> Even as a field of study, artificial intelligence has hazy boundaries, as it refers to many disparate specialties like robotics,<sup>44</sup> transportation,<sup>45</sup> human-computer interaction,<sup>46</sup> and predictive technologies.<sup>47</sup> As such, one researcher comments, “the field doesn’t have a

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<sup>37</sup> Erik Brynjolfsson & Andrew McAfee, *The Business of Artificial Intelligence*, HARV. BUS. REV., July 2017 at 3, 4 (“The effects of AI will be magnified in the coming decade, as manufacturing, retailing, transportation, finance, health care, law, advertising, insurance, entertainment, education, and virtually every other industry transform their core processes and business models to take advantage of machine learning.”).

<sup>38</sup> *Id.* (“The bottleneck now is in management, implementation, and business imagination.”).

<sup>39</sup> Cade Metz, *Tech Giants Are Paying Huge Salaries for Scarce A.I. Talent*, N.Y. TIMES (Oct. 22, 2017), [https://www.nytimes.com/2017/10/22/technology/artificial-intelligence-experts-salaries.html?\\_r=1](https://www.nytimes.com/2017/10/22/technology/artificial-intelligence-experts-salaries.html?_r=1) (“In the entire world, fewer than 10,000 people have the skills necessary to tackle serious artificial intelligence research . . .”).

<sup>40</sup> See, e.g., Kate Kaye, *Is This AI or BS? Artificial Intelligence Is All the Rage, but Sometimes It’s Just Hype*, ADAGE (Apr. 19, 2017), <http://adage.com/article/datadriven-marketing/ai-bs/308718/> (discussing the marketing power and oversimplification of the buzzwords “artificial intelligence”).

<sup>41</sup> Brynjolfsson & McAfee, *supra* note 37, at 4 (“Simply calling a dating site ‘AI-powered,’ for example, doesn’t make it any more effective, but it might help with fundraising.”).

<sup>42</sup> See e.g., *The AI Disruption Bundle: The Guide to Understanding How Artificial Intelligence Is Impacting the World*, BUS. INSIDER (Oct. 6, 2017, 3:30 PM), <http://www.businessinsider.com/understanding-artificial-intelligence-impacting-world-2017-10> (describing artificial intelligence as disruptive).

<sup>43</sup> Ian Bogost, *‘Artificial Intelligence’ Has Become Meaningless*, ATLANTIC (Mar. 4, 2017), <https://www.theatlantic.com/technology/archive/2017/03/what-is-artificial-intelligence/518547/> (referencing artificial intelligence robots).

<sup>44</sup> Felix Ingrand & Mark Ghallab, *Robotics and Artificial Intelligence: A Perspective on Deliberation Functions*, AI COMMUNICATIONS, IOS PRESS (Apr. 3, 2015), <https://hal.archives-ouvertes.fr/hal-01138117/document> (discussing AI and robotics).

<sup>45</sup> See generally Sebastian Ramos et al., *Detecting Unexpected Obstacles for Self-Driving Cars: Fusing Deep Learning and Geometric Modeling*, ARXIV.ORG (Dec. 20, 2016), <https://arxiv.org/pdf/1612.06573.pdf> (discussing AI and cars).

<sup>46</sup> See generally Jose Maria Garcia-Garcia et al., *Emotional Detection: A Technology Review*, RESEARCHGATE (2017), [https://www.researchgate.net/profile/Jose\\_Garcia-Garcia4/publication/320359659\\_Emotion\\_detection\\_a\\_technology\\_review/links/59e620a2a6fdcc3dcd33e82f/Emotion-detection-a-technology-review.pdf](https://www.researchgate.net/profile/Jose_Garcia-Garcia4/publication/320359659_Emotion_detection_a_technology_review/links/59e620a2a6fdcc3dcd33e82f/Emotion-detection-a-technology-review.pdf) (discussing human-AI interactions).

<sup>47</sup> See generally David Silver et al., *Mastering the Game of Go Without Human Knowledge*, 550 NATURE 356

coherent theory.”<sup>48</sup>

### B. Machine Learning Versus Traditional Computer Programming

In previous decades, machines operated according to rules that humans painstakingly programmed by hand, “writing code of exactly what [they] want[ed] the machine to do.”<sup>49</sup> This method of computation powered all the wide array of computer applications through the twentieth century, but it could not automate the many tasks that humans do that cannot be practically reduced to sets of rules. One such task is facial recognition. Using the example of how he can easily recognize his mother’s face, one AI researcher comments, “I . . . recognize it but I couldn’t really write code to do it.”<sup>50</sup> It is for this reason, according to Polanyi’s paradox, that there are fundamental limits to how much knowledge humans can impart to machines.<sup>51</sup> More recently, however, machine learning has emerged as a revolutionary subfield of AI because it can circumvent that limitation.

In short, machine learning refers to a program’s ability to “extract[] patterns from raw data.”<sup>52</sup> “Deep learning,” a type of machine learning, has powered much of the recent gains in machine learning research. Deep learning programs optimize accuracy and, over time, yield increasingly accurate results for a given task. That is, the machine has the “ability to keep improving its performance without humans having to explain exactly how to accomplish” a task.<sup>53</sup> Now, “machines learn on their own things that we don’t know how to explain.”<sup>54</sup> After being shown thousands or even millions of examples,<sup>55</sup> the machines learn patterns, correlations, and rules—

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(2017) (discussing the AI AlphaGo’s use of predictive technology to master the game of Go).

<sup>48</sup> Jerry Kaplan, *AI’s PR Problem*, MIT TECH. REV. (Mar. 3, 2017), <https://www.technologyreview.com/s/603761/ais-pr-problem/>.

<sup>49</sup> *How AI Is Already Changing Business*, HBR IDEACAST (July 20, 2017), <https://hbr.org/ideacast/2017/07/how-ai-is-already-changing-business> [hereinafter *AI Changing Business*].

<sup>50</sup> *Id.*

<sup>51</sup> See Brynjolfsson & McAfee, *supra* note 37, at 6; see also David H. Autor, *Polanyi’s Paradox and the Shape of Employment Growth* 8 (Nat’l Bureau of Econ. Research, Working Paper No. 20485, 2014) (“[E]ngineers cannot program a computer to simulate a process that they (or the scientific community at large) do not explicitly understand. This constraint is more binding than one might initially surmise because there are many tasks that we understand tacitly and accomplish effortlessly for which we do not know the explicit ‘rules’ or procedures.”).

<sup>52</sup> IAN GOODFELLOW, YOSHUA BENGIO & AARON COURVILLE, *DEEP LEARNING* 2–3 (9th ed.2016).

<sup>53</sup> Brynjolfsson & McAfee, *supra* note 37, at 4.

<sup>54</sup> *AI Changing Business*, *supra* note 49.

<sup>55</sup> See Yonghui Wu et al., *Google’s Neural Machine Translation System: Bridging the Gap Between Human and Machine Translation*, ARXIV.ORG 1, 14 (2016), <https://arxiv.org/pdf/1609.08144.pdf> (describing the process of teaching a machine English to French translation using thirty-six million pairs of sentences).

sometimes the ones that humans use to accomplish the task but other times ones that humans cannot perceive,<sup>56</sup> or had not used previously.<sup>57</sup> Indeed, many times the programmer him- or herself cannot account for *how* the machine came to a particular result, even if the result is correct.<sup>58</sup> Tasks that were once impossible to automate are now on par with human experts, including not only facial recognition,<sup>59</sup> but also skin cancer detection<sup>60</sup> and some types of language translation.<sup>61</sup>

With many applications emerging, and far more on the horizon, it is inevitable that attorneys will do with machine learning what they have done before with all manner of devices, machines, and technical software: use it to win. Law firms are already incorporating machine learning software into other aspects of their business, like e-discovery,<sup>62</sup> while government regulators have begun to use machine learning to assist in investigating fraud and other white-collar crimes.<sup>63</sup> Prosecutors, specifically, may find several aspects of their work affected by machine learning, including justifying

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<sup>56</sup> See, e.g., Heather Murphy, *Why Stanford Researchers Tried to Create a 'Gaydar' Machine*, N. Y. TIMES (Oct. 9, 2017), <https://www.nytimes.com/2017/10/09/science/stanford-sexual-orientation-study.html> (using photos of gay men and straight men, an AI was able to use aspects of the human face to predict a man's sexual orientation with up to ninety-one percent accuracy).

<sup>57</sup> *Id.*

<sup>58</sup> Andreas Holzinger et al., *What Do We Need to Build Explainable AI Systems for the Medical Domain?*, ARXIV.ORG (2017), <https://arxiv.org/pdf/1712.09923.pdf> (“However, the central problem of such models is that they are regarded as black-box models and even if we understand the underlying mathematical principles of such models they lack an explicit declarative knowledge representation, hence we have difficulty in generating the underlying explanatory structures.”).

<sup>59</sup> See generally Will Knight, *Paying with Your Face*, MIT TECH. REV. (Mar.–Apr. 2017), <https://www.technologyreview.com/s/603494/10-breakthrough-technologies-2017-paying-with-your-face/> (detailing how researchers have shown their programs rival most humans in ability to recognize faces).

<sup>60</sup> Andre Esteva et al., *Dermatologist-level Classification of Skin Cancer with Deep Neural Networks*, 542 NATURE 115, 115 (2017).

<sup>61</sup> Wu et al., *supra* note 55, at 19.

<sup>62</sup> See Avaneesh Marwaha, *Seven Benefits of Artificial Intelligence for Law Firms*, LAW TECH. TODAY (July 13, 2017), <http://www.lawtechnologytoday.org/2017/07/seven-benefits-artificial-intelligence-law-firms/>; Catalyst, *How AI and Machine-Learning Tools Lighten the eDiscovery Load*, ABOVE L. (May 17, 2017, 3:02 PM), <https://abovethelaw.com/2017/05/how-ai-and-machine-learning-tools-lighten-the-ediscovery-load/>; Julie Sobowale, *How Artificial Intelligence Is Transforming the Legal Profession*, A.B.A. J. (Apr. 2016), [http://www.abajournal.com/magazine/article/how\\_artificial\\_intelligence\\_is\\_transforming\\_the\\_legal\\_profession](http://www.abajournal.com/magazine/article/how_artificial_intelligence_is_transforming_the_legal_profession) (all outlining how AI is used to save time in discovery).

<sup>63</sup> Gerard Hoberg & Craig Lewis, *Do Fraudulent Firms Produce Abnormal Disclosure?* 1–3 (Vand. Owen Graduate Sch. of Mgmt. Research Paper No. 2298302, 2015), (using a topic modeling technique that discovers clusters of text to predict whether a firm's SEC disclosure shows signs that the firm is committing fraud); Scott W. Bauguess, *The Hope and Limitations of Machine Learning in Market Risk Assessment*, SEC (Mar. 6, 2015), <https://cfe.columbia.edu/files/seasieor/center-financial-engineering/presentations/MachineLearningSECRiskAssessment030615public.pdf> (discussing how the SEC could produce a model to help detect illicit behavior).

searches<sup>64</sup> and determining which crimes to prosecute.<sup>65</sup> Though machine learning has not yet been widely used to produce evidence itself, the capability, accessibility, and incentives to do so already exist.

### III. HOW MACHINE LEARNING WORKS

A machine learning program extracts useful patterns out of a large collection of data to perform a certain task.<sup>66</sup> To be clear, the learning itself is not the ultimate goal, but rather the means to achieve that goal.<sup>67</sup> “Learning,” in this context, refers to an improvement in performance of the task over time.<sup>68</sup> Practicing attorneys can at least grasp the fundamentals of machine learning by becoming familiar with the tasks these programs can perform and the processes by which the machines “learn.”

#### A. Tasks

Machines can learn to perform many tasks. The most common include classification (e.g., image or facial recognition), classification with missing inputs (e.g., recognizing an object or face from a corrupted or incomplete image), regression (e.g., predicting a numerical value given certain conditions), transcription (e.g., speech-to-text software), machine translation (e.g., translating from one natural language to another), structured output (e.g., image recognition in which the machine can describe the image in grammatical sentences), anomaly detection (e.g., credit card fraud detection), synthesis and sampling (i.e., the machine generates new examples similar to the examples it has learned), imputation of missing values (i.e., predicting certain data points given other data points), and denoising (i.e., match an inputted “corrupted” example to a “clean” example).<sup>69</sup>

Many of the emerging or possible evidentiary applications of machine learning fall into these general categories. For instance, risk assessment in parole hearings could be accomplished with a regression analysis.<sup>70</sup> Facial recognition could identify a defendant even with video or photographic

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<sup>64</sup> See generally Rich, *supra* note 11 (discussing machine learning and the Fourth Amendment).

<sup>65</sup> See Ferguson, *supra* note 1, at 732 (“[T]he predictive prosecution model shifts the identification of problem areas from the street cops to the lawyers.”).

<sup>66</sup> Kaplan, *supra* note 48.

<sup>67</sup> See GOODFELLOW ET AL., *supra* note 52, at 97 (explaining that once a specific task is defined, like walking, learning how to do the task is not the task itself, but gaining the means to perform the task).

<sup>68</sup> *Id.* (“A computer program is said to learn from experience *E* with respect to some class of tasks *T* and performance measure *P*, if its performance at tasks in *T*, as measured by *P*, improves with experience *E*.”).

<sup>69</sup> *Id.* at 98–101.

<sup>70</sup> Lacambra, *supra* note 3.

evidence in less than ideal circumstances.<sup>71</sup> Body recognition algorithms may achieve the same where no facial images are captured.<sup>72</sup> Anomaly detection can scan corporate filings or other behavior to assess evidence of wrongdoing.<sup>73</sup> It impossible to catalog all the ways in which machine learning may produce evidence, especially as the technology further evolves, but suffice to say these are only among the presently foreseeable.

### B. Learning

To perform the task, the machine first must learn from examples, which are simply a collection of quantified features.<sup>74</sup> When the data are already numerical, quantification is straightforward. In other situations, how the data is quantified is not immediately obvious or can reflect programmer judgment. For instance, an image of a face is quantified on the basis of pixel values that a screen would use to display the image.<sup>75</sup> Once the data have been translated into numbers, the programmer must take some of the data whose properties are already known, referred to as “training data,”<sup>76</sup> and teach the machine the rules or associations that will be useful when the machine later analyzes new data whose properties are *not* already known. This process is referred to as “supervised learning.”<sup>77</sup>

To echo the facial recognition example above,<sup>78</sup> a programmer at this stage will feed a set of pictures of her mother (which the programmer knows to be of her mother) into the machine. Critically, the programmer explicitly tells the machine to associate the images of that face with her mother, such as by labeling each image with the mother’s name. At this point, the machine knows these images are of the mother not by any inference or computation, but because the programmer has told the machine explicitly. Then, the machine analyzes the pictures of the mother’s face and, on its own, establishes other associations, correlations, or rules that will enable it to

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<sup>71</sup> See John Nawara, *Machine Learning: Face Recognition Technology Evidence in Criminal Trials*, 49 U. LOUISVILLE L. REV. 601, 608–09 (2011).

<sup>72</sup> Chikahito Nakajima et al, *Full-body Person Recognition System*, 36 PATTERN RECOGNITION 1997, 1997 (2003) (“We describe a system that learns from examples to recognize person in images taken indoors.”).

<sup>73</sup> Hoberg & Lewis, *supra* note 63; Bauguess, *supra* note 63.

<sup>74</sup> See GOODFELLOW ET AL., *supra* note 52, at 97 (defining example as “a collection of features that have been quantitatively measured from some object or event that we want the machine learning system to process”); *id.* at 103 (explaining how “supervised learning” in deep learning computers uses sets of data curated and labeled for the neural network to experience).

<sup>75</sup> *Id.* at 97 (“[T]he features of an image are usually the values of the pixels in the image.”).

<sup>76</sup> *Id.* at 119.

<sup>77</sup> *Id.* at 103. Note that these categories are not clearly defined and may blur at the edges.

<sup>78</sup> See Nawara, *supra* note 71.

recognize the programmer's mother in new images it has not seen before. For example, the machine might establish rules about skin tone, distance of the eyes from one another, and height or width of the face.<sup>79</sup>

Once the machine has learned from the training data and deduced some set of rules, its performance is then tested and refined on a separate pool of testing data, called the "test set," the properties of which are also known.<sup>80</sup> The programmer then assesses the error rates of the machine's accuracy and makes adjustments. In the present example, our programmer would at this stage feed into the machine new images of her mother that the machine has not seen before and test how well it can identify the mother. When the machine has reached some level of accuracy that the researcher feels is satisfactory, it is used to analyze real world data. Ideally, the machine should be able to identify the mother in any image where she is present, including situations of various image quality, bright or dark lighting, different angles, or no matter the mother's hair style, presence or absence of makeup, differences in outfit, or other situations where her appearance is slightly different.

#### IV. ADMISSIBILITY UNDER FEDERAL RULE OF EVIDENCE 702

When machine learning output is used as substantive evidence in litigation in federal court, it most likely will be in the form expert testimony governed by Rule 702 and *Daubert*, though if or how it may be used in state courts depends on each state's rules of evidence.<sup>81</sup> Rule 702 governs the

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<sup>79</sup> See GOODFELLOW ET AL., *supra* note 52, at 8 (explaining that "deep learning" is a type of machine learning that is often used in facial recognition, but is used in other contexts, as well. In general, deep learning is a process of representing abstract concepts in terms of simpler concepts.); *see also id.* at 6 (indicating an abstract concept, like a human face, can be represented as a particular arrangement of simpler concepts, like lines, contours, and edges); *id.* at 8 (describing a typical deep learning algorithm would analyze an image first for a series of lines (a relatively simple analysis), then for a series of connected and contoured lines (a slightly more complex analysis building upon the first), and finally assess if the present arrangement of lines, contours, and edges matches the arrangement that the algorithm had learned corresponds to a face).

<sup>80</sup> *Id.* at 106 (explaining how accuracy of the performance data is tested).

<sup>81</sup> The Federal Rules of Evidence do not govern all the ways in which machine learning will likely infect litigation, such as investigations, bail determinations, and sentencing. See Robin A. Smith, *Opening the Lid on Criminal Sentencing Software*, DUKE TODAY (July 19, 2017), <https://today.duke.edu/2017/07/opening-lid-criminal-sentencing-software> (explaining the black-box software of sentencing as a mystery); Laura Smith-Spark, *Voice, Words May Provide Key Clues About James Foley's Killer*, CNN (Aug. 24, 2014), <https://www.cnn.com/2014/08/22/world/europe/british-jihadi-hunt/index.html> (last updated Aug. 24, 2014, 6:07 AM) (discussing the use of voice identification software to identify a hooded ISIS militant); Eric Westervelt, *Did a Bail Reform Algorithm Contribute to This San Francisco Man's Murder?*, NPR (Aug. 18, 2017, 2:00 PM), <https://www.npr.org/2017/08/18/543976003/did-a-bail-reform-algorithm-contribute-to-this-san-francisco-man-s-murder> (discussing a computer algorithm deciding the fate of a defendant). Without the schema of the Federal Rules of Evidence in place, it is safe to assume that those areas



admissibility of expert testimony in federal court.<sup>82</sup> For a qualified expert to testify, the proponent must show that the testimony will assist the trier of fact, that the opinion is based on sufficient facts or data, that the testimony is the product of reliable principles and methods, and that the principles and methods are reliably applied to the instant case.<sup>83</sup> When the judge determines the admissibility of expert testimony, she is only making “a preliminary assessment of whether the reasoning or methodology underlying the testimony is scientifically valid and of whether that reasoning or methodology properly can be applied to the facts in issue.”<sup>84</sup> The focus is not on the conclusions that the methods generate.<sup>85</sup>

Machine learning output is likely admissible under both under *Daubert* and the text of Rule 702 itself. However, the exact manner in which the algorithm was created or the way it would be used at trial may, in some cases, render it inadmissible.

#### A. *Daubert Criteria*

In *Daubert v. Merrell Dow Pharmaceuticals*, the Supreme Court established a general framework for federal courts to assess whether expert testimony is the product of “reliable principles and methods” under Rule 702.<sup>86</sup> The Court lists four non-dispositive considerations, none of which categorically bar machine learning evidence. First, whether the theory or technique can be or has been tested; second, whether the theory or technique has been subject to peer-reviewed publication; third, the existence of error rates; and fourth, whether the theory or technique enjoys general acceptance in the

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are the first where we would see machine learning at work, especially since today those areas are seeing *non-machine* learning algorithms grow in popularity and legal legitimacy. *See, e.g., State v. Loomis*, 881 N.W.2d 749, 752–53 (Wis. 2016) (describing the use of risk assessment algorithms in the context of probation, parole, and sentencing); *Malenchik v. State*, 928 N.E.2d 564, 575 (Ind. 2010) (concluding that trial judges “are encouraged” to use risk assessment software to inform sentencing decisions).

<sup>82</sup> Federal Rules of Evidence 702 reads:

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

- (a) the expert’s scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue;
- (b) the testimony is based on sufficient facts or data;
- (c) the testimony is the product of reliable principles and methods; and
- (d) the expert has reliably applied the principles and methods to the facts of the case.

FED. R. EVID. 702.

<sup>83</sup> *Id.*

<sup>84</sup> *Daubert v. Merrell Dow Pharm., Inc.*, 509 U.S. 579, 592–93 (1993).

<sup>85</sup> *Id.* at 595 (stating the focus is solely on principles and methodology).

<sup>86</sup> *Id.*; *see also* FED. R. EVID. 702(c).

field or scientific community.<sup>87</sup>

Machine learning easily satisfies three of the four *Daubert* factors without extensive discussion. Machine learning evidence would certainly meet the testability consideration, since these processes produce results that can be shown to be false, sometimes in spectacular ways. For instance, in 2015, Google’s object recognition system falsely identified two African Americans as gorillas, quickly prompting outcry and a correction to the algorithm.<sup>88</sup> Machine learning also satisfies *Daubert*’s peer review consideration, since the peer reviewed literature on it has proliferated in recent years, with some of its scientific principles dating back to the mid-twentieth century.<sup>89</sup> And, machine learning enjoys general acceptance in the field or scientific community, and practitioners are applying the technology in myriad disciplines.<sup>90</sup>

*Daubert*’s requirement that the science have either known or potential error rates,<sup>91</sup> however, presents a more complicated analysis. Machine learning algorithms indeed have calculable error rates, though the relevance of these error rates to the particular situation is oftentimes questionable.

Machine learning algorithms usually have two important error rates. The first is its test set error rate with respect to training data, which are the examples whose properties are already known to the researcher and which are the basis for the algorithm’s improved performance over time.<sup>92</sup> Eventually, a second error rate captures the algorithm’s performance when it is unleashed upon real-world examples with unknown properties.<sup>93</sup> Both error rates typically appear as a singular number that masks other important statistics, like whether the algorithm is more likely to give false positives or false negatives, an important detail that should be revealed at a *Daubert* hearing or on cross examination.

Subjective programmer judgments can inform the error rate, such as whether or not to give partial credit for a partial success,<sup>94</sup> though in some contexts it is difficult to assess what should be considered a success or failure

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<sup>87</sup> *Daubert*, 509 U.S. at 593–94.

<sup>88</sup> Tom Simonite, *When It Comes to Gorillas, Google Photos Remains Blind*, WIRED (Jan. 11, 2018, 7:00 AM), <https://www.wired.com/story/when-it-comes-to-gorillas-google-photos-remains-blind/> (“In 2015, a black software developer embarrassed Google by tweeting that the company’s Photos service had labeled photos of him with a black friend as ‘gorillas.’”).

<sup>89</sup> See GOODFELLOW ET AL., *supra* note 52, at 12. (“[D]eep learning dates back to the 1940s.”).

<sup>90</sup> *Id.* at 98–101.

<sup>91</sup> *Daubert*, 509 U.S. at 594 (stating in the case of a scientific technique the court should consider the potential rate of error).

<sup>92</sup> See GOODFELLOW ET AL., *supra* note 52, at 102 (referring to the error rate value as “the expected 0-1 loss”).

<sup>93</sup> *Id.*

<sup>94</sup> *Id.*

in the first place. For example, in a lip-reading algorithm, is an inelegant but understandable translation a success or a failure? And if it is only a partial success, how partial is it? The answer, which will inform the error rates, is ultimately a human judgment, and there may be no consistency from one programmer to another. For purely binary outcomes, like the task of identifying a defendant, no such thing as partial success would exist, because the individual the algorithm is identifying in a video, photo, or recording either is the defendant or is not.

Additionally, a machine's overall stated error rate may mask a higher rate of error when it draws conclusions about a defendant who does not share characteristics with the initial training data. For instance, an error rate for a machine that has been trained on racially diverse data may be less reliable for a single racial category than others. In one facial recognition application, "the software is right 99 percent of the time" but only "[w]hen the person in the photo is a white man."<sup>95</sup> "But the darker the skin, the more errors arise—up to nearly 35 percent for images of darker skinned women."<sup>96</sup> Yet, oftentimes today's machines are *not* trained on racially diverse data, which presents other problems for how to generalize its conclusions. For instance, one recent facial recognition system reported 97.35% accuracy but on a dataset that turned out to be 77.5% male and 83.5% white.<sup>97</sup> Its error rates were never broken down by race or gender.<sup>98</sup>

Aurally, too, machines struggle with accents that are not standard American or British. Speech recognition algorithms may vary in their accuracy when dealing with accents from various regions. Scottish was the most difficult for one speech recognition algorithm to understand, followed closely by American southerners from Georgia.<sup>99</sup> Nor are these variables entirely independent. Sometimes the accuracy of a speech recognition algorithm is highly correlated with race, gender, or age: "higher-pitched voices are more difficult for speech-recognition systems" which makes them

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<sup>95</sup> Steve Lohr, *Facial Recognition Is Accurate, If You're a White Guy*, N.Y. TIMES (Feb. 9, 2018), <https://www.nytimes.com/2018/02/09/technology/facial-recognition-race-artificial-intelligence.html?smid=fb-nytimes&smtyp=cur>.

<sup>96</sup> *Id.*

<sup>97</sup> Joy Buolamwini & Timnit Gebru, *Gender Shades: Intersectional Accuracy Disparities in Commercial Gender Classification*, 81 PROC. MACHINE LEARNING RES. 1, 3 (2018) (citing Hu Han & Anil K. Jain, *Age, Gender and Race Estimation from Unconstrained Face Images*, MSU TECH. REP. 1, 2 (2014)).

<sup>98</sup> *Id.* at 3 (citing Yaniv Taigman et al., *Deepface: Closing the Gap to Human-level Performance in Face Verification*, 2014 IEEE CONF. COMPUTER VISION & PATTERN RECOGNITION 1701, 1701).

<sup>99</sup> Johnson, *In the World of Voice-recognition, Not All Accents Are Equal*, ECONOMIST (Feb. 15, 2018), <https://www.economist.com/news/books-and-arts/21737017-you-can-train-your-gadgets-understand-what-youre-saying-world> ("The automatic captioning did worst with the Scottish speakers, transcribing more than half of the words incorrectly, followed closely by American southerners (from Georgia).").

less accurate overall for women and especially children.<sup>100</sup> Multiple popular speech recognition algorithms had similar trouble with black and mixed-race speakers.<sup>101</sup>

Thus, the mosaic of different possible error rates presents a more complicated picture than a single, impressively low error rate may reflect. For this reason, machine learning evidence is particularly susceptible to violating Rule 702(d)'s requirement that the evidence be "reliably applied the principles and methods to the facts of the case."<sup>102</sup> If an algorithm has an impressive rate of error with respect to data that bears little resemblance to the instant defendant, then its conclusions are not being reliably applied to the facts of the case.<sup>103</sup>

### B. Problems of Data

Rule 702 requires that the proffered evidence be based on sufficient facts or data and be the product of reliable principles and methods.<sup>104</sup> This section suggests several inquiries of data collection and use that may affect the admissibility of machine learning output under 702(b) and 702(c).

#### 1. How Large Was the Training Dataset?

Sample size is an initial inquiry that is by no means unknown to lawyers challenging scientific evidence.<sup>105</sup> Machine learning algorithms require very large datasets to extract useful patterns and make accurate assessments, and more complicated tasks require more examples to fine tune their accuracy. For instance, text recognition (a relatively simple task) may require only a few thousand examples, whereas language translation (an extremely complex task) requires tens of millions of examples.<sup>106</sup> The party seeking to admit the evidence would want assurances that the training data is sufficiently large for the given task, whereas the party seeking to exclude the evidence would want

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<sup>100</sup> *Id.* ("It also did worse with women: higher-pitched voices are more difficult for speech-recognition systems, one reason they tend to struggle with children.").

<sup>101</sup> *Id.* ("In a follow-up experiment, Ms. Tatman used both YouTube and Bing Speech, made by Microsoft, to test only American accents. Both found black and mixed-race speakers harder to comprehend than white ones.").

<sup>102</sup> FED. R. EVID. 702(d).

<sup>103</sup> *Gen. Elec. Co. v. Joiner*, 522 U.S. 136, 146 (1997) ("A court may conclude that there is simply too great an analytical gap between the data and the [expert] opinion proffered.").

<sup>104</sup> FED. R. EVID. 702(b)-(c).

<sup>105</sup> *See* FED. JUD. CTR., REFERENCE MANUAL ON SCIENTIFIC EVIDENCE 246 (3d ed. 2011) (pondering the question of how large a sample size should be when lawyers are making scientific inquiries).

<sup>106</sup> *See* Wu et al., *supra* note 55 (teaching a machine English to French translation using thirty-six million pairs of sentences).

to inquire as to how many examples the algorithm has learned and if that number is in keeping with what is generally accepted for the task.

2. *Were the Training Data Gathered or Generated in Ways that Produced a Biased Sample?*

Not only must the dataset be large, but it also must have some baseline quality to make useful predictions. The quality of the data, and the extent to which it may be biased in a particular way, can be probed with various inquiries. Where did the data come from? Did the researcher him-or-herself gather the data according to accepted methods? If the researcher instead received the data from a third party, can he or she vouch for its quality in any specific way? In the case of open source methods<sup>107</sup> or crowdsourced<sup>108</sup> data, which are common in the machine learning field, is such verification even possible?

Courts are already familiar with challenges to data collection methods, and evaluating whether they produced a biased sample that would reduce the data's relevancy to the present issue. In the case of machine learning, the representativeness of the dataset to the given defendant's jurisdiction, crime, or any other feature is crucial for drawing appropriate conclusions from the machine's output. This inquiry has obvious implications for a potential Equal Protection challenge,<sup>109</sup> but even assuming there are no cognizable constitutional issues with the data, the data simply may not be relevant to a given defendant for any number of reasons.

The Wisconsin Supreme Court in *State v. Loomis*<sup>110</sup> demonstrates how these bias and relevancy concerns are already manifesting in algorithmic output based on data. In challenging the State's use of Correctional Offender Management Profiling for Alternative Sanctions ("COMPAS") to determine his sentence, Loomis's expert testified that sentencing courts have little assurance that the data COMPAS uses are unbiased, or were even

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<sup>107</sup> "Open source software is software with source code that anyone can inspect, modify, and enhance." *What Is Open Source?*, OPEN SOURCE, <https://opensource.com/resources/what-open-source> (last visited Oct. 24, 2018).

<sup>108</sup> "Crowdsourcing is a type of participative online activity in which an individual, organization, or company with enough means proposes to a group of individuals of varying knowledge, heterogeneity, and number, via a flexible open call, the voluntary undertaking of a task." Enrique Estellés Arolas & Fernando González Ladrón-de-Guevara, *Towards an Integrating Crowdsourcing Definition*, 38 J. INFO. SCI. 1, 11 (2011).

<sup>109</sup> The extent to which machine learning evidence might be sufficiently biased in a way that is adverse to minority groups to mount a cognizable Fourteenth Amendment challenge is outside the scope of this Comment, but it is a critical question ripe for further research.

<sup>110</sup> 881 N.W.2d 749, 754 (Wis. 2016) (noting that the risk-need assessment tool name COMPAS does not predict the specific likelihood that an individual offender will reoffend).

relevant to Loomis:

The Court does not know how the COMPAS compares that individual's history with the population that it's comparing them with. The Court doesn't even know whether that population is a Wisconsin population, a New York population, a California population. . . . There's all kinds of information that the court doesn't have, and what we're doing is we're misinforming the court when we put these graphs in front of them and let them use it for sentence.<sup>111</sup>

Similar questions would be appropriate when probing a machine learning dataset's relevancy. If a machine learning algorithm is generating inculpatory evidence for a Wisconsin defendant, should the data only come from the Wisconsin population, or the Midwest region, or can nationwide data suffice? Geography would not be the only consideration, as other factors could bias the data. The answers to these questions are intensely fact-specific and would depend on what the proponent of the machine learning evidence is trying to prove.

Moreover, even if the prosecution relies on official statistics gathered by government agencies, these datasets are not inherently high quality. Today, the accuracy of government databases is often accepted "as an article of faith, with courts according them a presumption of reliability."<sup>112</sup> While data-driven governance is often a laudable goal, "[t]oday, the prevailing zeitgeist of governments is one of database expansion, not quality control or accountability, and a blasé acceptance of data error and its negative consequences for individuals."<sup>113</sup> Some important figures have taken note. In *Herring v. United States*, Justice Ginsburg recognized in her dissent that "[t]he risk of error stemming from these databases is not slim," noting issues with National Crime Information Center, terror watch lists, and public employment databases.<sup>114</sup>

Professors Logan and Ferguson note the series of challenges and pitfalls that accompany government database creation. When data are first gathered or generated, basic human error in collection or interpretation is common.<sup>115</sup> Sometimes data are collected and uploaded without legal authorization or counter to what was initially ordered.<sup>116</sup> Once errors are

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<sup>111</sup> *Id.* at 756–57 (quoting the testimony of Loomis's expert).

<sup>112</sup> Wayne A. Logan & Andrew Guthrie Ferguson, *Policing Criminal Justice Data*, 101 MINN. L. REV. 541, 543–44 (2016).

<sup>113</sup> *Id.* at 543.

<sup>114</sup> 555 U.S. 135, 155 (2009) (Ginsburg, J., dissenting).

<sup>115</sup> Logan & Ferguson, *supra* note 112, at 559 ("At the point of [data] collection, accuracy can be impaired by basic human error.").

<sup>116</sup> *Id.* (noting that states often upload DNA profiles not authorized by the law and DNA information that should be destroyed is often retained).

made, they are difficult to discover and difficult to correct.<sup>117</sup> If the error is corrected in one database, it is not guaranteed that the correction will filter to the myriad of other databases that had, in the past, copied from the initial database.<sup>118</sup> Of course, in a federalist system with hyperlocalist police power, uniform data collection, management, correction, and dissemination would be as difficult to implement as it would be helpful.<sup>119</sup>

### 3. *Was the Data Manipulated? If So, How, and Does that Matter?*

When a dataset is not large enough, programmers have several techniques for manipulating it to artificially create a larger training set. For example, the algorithm may take many random samples from the original dataset to create many other, smaller datasets.<sup>120</sup> The programmer may also intentionally distort the examples, such as by warping images or adding random noise.<sup>121</sup> The forms of manipulation are largely influenced by subjective programmer judgment and norms in the field.

### 4. *How Was the Data Tagged and Labeled?*

Moreover, even if a large dataset is collected or generated using standard techniques, it must be labeled and organized properly, which, for datasets with millions of examples, is a menial but crucial task. Machine learning programs only “learn” what they are “taught” from the data, and it is the programmers who make judgments about what the data show by the way that they are labeled. Indeed, researchers can intentionally teach the algorithm nonsense simply by labeling.<sup>122</sup> In that way, who labeled the data and how—and the extent to which the labeling was done properly—are

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<sup>117</sup> *Id.* at 586 (“Ex ante detection of database error, as Professor Kenneth Karst noted fifty years ago, ‘depends on the subject’s access to his own file and his awareness of the need to inspect it. Even when a record is freely accessible to its subject, there is no assurance that the subject will know of its existence or its contents.’” (quoting Kenneth L. Karst, “*The Files*”: *Legal Controls over the Accuracy and Accessibility of Stored Personal Data*, 31 LAW & CONTEMP. PROBS. 342, 358 (1966)).

<sup>118</sup> *Id.* at 588 (“Data is often shared, replicated, backed up and stored in many different databases at once. Even if a data error is corrected, this does not guarantee that other shared datasets will reflect the change.”).

<sup>119</sup> *Id.* at 596–611 (suggesting legislation, regulation, and best practices to coordinate data at the federal, state, and local levels).

<sup>120</sup> GOODFELLOW ET AL., *supra* note 52, at 120 (discussing the most common method, the k-fold cross-validation procedure).

<sup>121</sup> See Ritchie Ng, *Machine Learning Photo OCR*, RITCHIENG.COM <http://www.ritchieng.com/machine-learning-photo-ocr/> (last updated Oct. 13, 2018) (noting the possibility of distorting examples through “warping the image”).

<sup>122</sup> See 3Blue1Brown, *Gradient Descent, How Neural Networks Learn | 2, Deep Learning, Chapter 2*, YOUTUBE (OCT. 16, 2017), at 18:10, <https://www.youtube.com/watch?v=IHZwWFHwa-w> (teaching an algorithm that an image of Isaac Newton is an image of a cow).

critical inquiries.

While the researcher may do the labeling herself, it is unlikely that she is labeling millions of examples by hand. Often researchers use open datasets already created for public use, but the researcher may have no idea how that data set was created and labeled.<sup>123</sup> Strangers sitting at home may do it for nominal payment via Amazon Mechanical Turk.<sup>124</sup> And, if one machine learning algorithm can label data,<sup>125</sup> other machine learning algorithms can then use that labeled data to learn other tasks, which can clearly have the advantage of labeling quickly but would only further compound the potential risks by adding one machine learning process on top of another.<sup>126</sup>

### C. Problems in the Source Code

An examination of software's source code may also bring to light details that affect the admissibility of the evidence under Rule 702. If the programming itself contains errors, then it is possible that the program's conclusions are not the "product of reliable principles and methods."<sup>127</sup> Broadly speaking, "source code" is a combination of words and mathematical symbols that have a particular meaning in a programming language.<sup>128</sup> Unlike "machine code," which is a binary collection of 1's and

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<sup>123</sup> Hector Garcia-Molina et al., *Challenges in Data Crowdsourcing*, 28 IEEE TRANSACTIONS ON KNOWLEDGE & DATA ENGINEERING 901, 905–07 (discussing problems with crowdsourced data).

<sup>124</sup> See Ng, *supra* note 121 ("Hire people on the web to label data (amazon mechanical turk).").

<sup>125</sup> Tom Simonite, *Google's Brain-Inspired Software Describes What It Sees in Complex Images*, MIT TECH. REV. (Nov. 18, 2014), <https://www.technologyreview.com/s/532666/googles-brain-inspired-software-describes-what-it-sees-in-complex-images/> ("Researchers at Google have created software that can use complete sentences to accurately describe scenes shown in photos . . .").

<sup>126</sup> Linking machine learning applications in this way is increasingly common. One University of California, Berkeley researcher has developed a dual machine learning system in which one algorithm identifies the species of bird in a photograph, while a second algorithm analyzes the decision-making of the first and creates, in sentence format, explanations of how the first algorithm made its species determination. See *For Artificial Intelligence to Thrive, It Must Explain Itself*, ECONOMIST (Feb. 15, 2018), <https://www.economist.com/news/science-and-technology/21737018-if-it-cannot-who-will-trust-it-artificial-intelligence-thrive-it-must> (discussing the pros and cons of "deep learning" in artificial intelligence). Google's AutoML project is actively researching machine learning algorithms that can themselves write new machine learning algorithms. See Cade Metz, *Building A.I. that Can Build A.I.*, N.Y. TIMES (Nov. 5, 2017), [https://www.nytimes.com/2017/11/05/technology/machine-learning-artificial-intelligence-ai.html?\\_r=0](https://www.nytimes.com/2017/11/05/technology/machine-learning-artificial-intelligence-ai.html?_r=0) (discussing Google's search for artificial intelligence that can effectively build other A.I.-reliant mechanisms in the absence of human A.I. experts).

<sup>127</sup> FED. R. EVID. 702(b).

<sup>128</sup> Edward J. Imwinkelried, *Computer Source Code: A Source of the Growing Controversy over the Reliability of Automated Forensic Techniques*, 66 DEPAUL L. REV. 97, 104 (2016) ("The source code itself is a combination of words and mathematical symbols that have a particular meaning in the selected language.").



0's, the source code is human readable,<sup>129</sup> and is likely to be intelligible to a defense expert.<sup>130</sup> Source code dictates which tasks a computer program performs, how the program performs the tasks, and the sequence in which the program performs the tasks.<sup>131</sup> The source code can provide uninhibited access to the exact ways the programmer decided the machine will operate and is much more informative than simply observing what goes in and what comes out.<sup>132</sup>

Crucially, the source code can reveal simple errors or faulty assumptions in the program's creation. In a given program, millions of lines of code—often pieced together from innumerable sources and developers—give rise to simple accidents in transcription, mistakes in conditional programming, software rot,<sup>133</sup> or faulty updates to legacy code.<sup>134</sup> When one programmer designs the initial version of a program, it may be difficult for subsequent programmers in later versions to work around or adapt to the personal style and conventions of the first.<sup>135</sup> Studies demonstrate that, as a result, error rates of one percent in code are common, which can correspond to tens of thousands of errors in a single program.<sup>136</sup>

Moreover, sometimes the software itself contains no errors in the programming, but, because of human errors in communication or misunderstanding, the program does not accomplish the task that was ultimately sought.<sup>137</sup> When the device uses several different scientific disciplines—like, for example, the way a breathalyzer must incorporate knowledge from programming, chemistry, and biology—differences in

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<sup>129</sup> *Id.* at 105.

<sup>130</sup> *Id.*

<sup>131</sup> *Id.* at 103.

<sup>132</sup> Chessman, *supra* note 19, at 182 (“While some information can be gleaned from viewing the program in action, this information is highly limited and may omit crucial details that relate to the reliability and accuracy of the program’s output.”).

<sup>133</sup> *Id.* at 190 (“‘Software rot’ [happens] where the quality, functionality, and usefulness of a program actually degrade over time. . . . [It] occurs for a variety of reasons. At the most basic level, each software update creates new interactions between different portions of the source code, which may also entail unforeseen interactions and unforeseen consequences.”).

<sup>134</sup> *Id.* at 186–92.

<sup>135</sup> *Id.* at 186 n.32 (“Subjective expressiveness is so pronounced that computer code is actually expressively distinguishable—it is possible ‘to recognize the author of a given program based on programming style’ in the same way one might identify Nietzsche by his obscurity or Hemingway by his verbosity.” (quoting Jane Huffman Hayes & Jeff Oflutt, *Recognizing Authors: An Examination of the Consistent Programmer Hypothesis*, 20 J. SOFTWARE TESTING VERIFICATION & RELIABILITY 329 (2010))).

<sup>136</sup> *Id.* at 186–87.

<sup>137</sup> *Id.* at 188. (“Even a programmer who makes no technical coding errors will produce inaccurate software if the programmer misunderstands the nature or requirements of the job. For example, a human programmer may misunderstand the program requirements because of miscommunication, misunderstanding, or accidental omission of important details during instruction.”).

understanding can give rise to methodological errors that do not come to light until even after product launch.<sup>138</sup> In that case, the programming itself could be flawless, yet the machine would still be unreliable.

These issues have come to light in only the few cases where state supreme courts ordered comprehensive inspection into the reliability of certain devices. In a Minnesota inquiry into the Intoxilyzer 5000EN, a breathalyzer device, several reliability issues were uncovered with an examination of the source code. Specifically, it was discovered that the device “has a margin of error, that radio frequencies from cell phones can disturb the accuracy of the test, and that the test may erroneously produce a deficient sample.”<sup>139</sup> Similarly, in New Jersey, a Special Master was appointed to evaluate the source code of the State’s widely used breathalyzer device, the Alcotest 7110 MKIII–C.<sup>140</sup> While the device was ultimately found to be reliable in most cases, the Special Master uncovered several problems with how the device functioned in certain situations, such as when testing the blood alcohol content of women over sixty<sup>141</sup> in addition to other issues, like a need for a corrective multiplier for some temperature readings.<sup>142</sup> Importantly, none of these errors or considerations would have come to the attention of the court without examination of the source code.

Even while these issues present themselves in the context of traditional, non-machine learning software, there is little reason to think that machine learning program development is immune from human misunderstanding, slips of the finger in transcription, faulty assumptions, or biases. It is true that machine learning algorithms work differently than programs of the past, with bigger sets of data, more processing power, and a different methodology. However, they are still created according to the ways that all software is created: as a product of human decision making, with lines of code running in conjunction with other software, and on hardware that degrades with time.

#### *D. Trade Secret Protections*

As a result of the considerations above, lawyers will have a profound interest in examining the underlying data and source code of machine learning software for such errors—and yet, standing in their way will be trade secret protections and reluctance of courts to compel discovery into these

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<sup>138</sup> See *id.* at 188 n.48 (explaining how programmers of a breathalyzer used an incorrect conversion factor that was not discovered until examination of the source code).

<sup>139</sup> *In re* Source Code Evidentiary Hearings in Implied Consent Matters, 816 N.W.2d 525, 545 (Minn. 2012).

<sup>140</sup> *State v. Chun*, 943 A.2d 114, 120 (N.J. 2008).

<sup>141</sup> *Id.* at 140.

<sup>142</sup> *Id.* at 145.

possible defenses. Tech firms are particularly concerned with protecting trade secrets in machine learning because the field is still in its infancy, meaning that established players have less advantage over competitive startups than in other areas they typically dominate, like search in the case of Google or social media in the case of Facebook.<sup>143</sup> Today, in non-machine learning software, parties cannot observe the critical details of how the program was constructed because of its proprietary nature, and the programming firms themselves are often reluctant to reveal the source code or data that form the basis of their business success.<sup>144</sup>

A trade secret is nonpublic information that is the subject of reasonable efforts to maintain its secrecy and that confers a business advantage over competitors who lack that information.<sup>145</sup> Both data and source code have consistently been held to be trade secrets, and thus courts have often been reluctant to compel discovery into either, even for defendants in criminal actions who could use the information to mount a meaningful defense.

Defendants and third-party developers are increasingly disputing the discoverability and trade secret protections with respect to discovery of non-machine learning software, yet rarely is the source code turned over for inspection.<sup>146</sup> For instance, the two technologies that have so far experienced the most litigation over discovery of source code are infrared breath testing devices (i.e., breathalyzers) and DNA probabilistic genotyping, mostly surrounding the popular software TrueAllele.<sup>147</sup> In the breathalyzer cases, “the clear majority of courts rejected defendants’ requests that a defense expert be granted access to the program’s source code.”<sup>148</sup> Likewise, in the TrueAllele cases, “although the issue has been litigated in at least seven states, no state court has ordered discovery of the TrueAllele source code” due to trade secret protections.<sup>149</sup>

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<sup>143</sup> See *Battle of the Brains*, ECONOMIST, Dec. 9, 2017, at 61, 62 (discussing how tech giants are investing large sums to develop their AI capabilities).

<sup>144</sup> Chartes Tait Graves & Brian D. Range, *Identification of Trade Secrets Claims in Litigation: Solutions for a Ubiquitous Dispute*, 5 NW. J. TECH & INTELL. PROP. 68, 85–86 (2006) (describing the typicality of plaintiff corporations resisting to specifically disclose trade secret details in litigation, including research and development details and business strategies).

<sup>145</sup> See, e.g., 18 U.S.C. § 1839 (2012) (defining “trade secret”); *Metallurgical Indus. Inc. v. Fourtek, Inc.*, 790 F.2d 1195, 1199–1203 (5th Cir. 1986) (explaining the requirements of a protected trade secret).

<sup>146</sup> Imwinkelried, *supra* note 128, at 100.

<sup>147</sup> *Id.*

<sup>148</sup> *Id.* (citing *State v. Underdahl*, 749 N.W.2d 117, 120–21 (Minn. Ct. App. 2008), *aff’d in part, rev’d in part*, 767 N.W.2d 677 (Minn. 2009) (affirming the district court’s denial of production of computer code); *People v. Cialino*, 831 N.Y.S.2d 680, 681–82 (N.Y. Crim. Ct. 2007); *State v. Burnell*, No. MV06479034S, 2007 WL 241230, at \*2 (Conn. Super. Ct. Jan. 18, 2007); *State v. Walters*, No. DBDMV050340997S, 2006 WL 785393, at \*1 (Conn. Super. Ct. Feb. 15, 2006); *Moe v. State*, 944 So. 2d 1096, 1097 (Fla. Dist. Ct. App. 2006)).

<sup>149</sup> Imwinkelried, *supra* note 128 at 111.

Undoubtedly, the state has a legitimate interest in protecting trade secrets not only for developers' economic protection, but also to ensure society reaps the benefit of continued innovation. Trade secrets are protected in federal and state statutes, as well as incorporated into Rule 501's evolving common law of privileges.<sup>150</sup> And yet, under statute and at common law, it is well-settled that the trade secret privilege is a conditional or qualified one.<sup>151</sup> The trade secrets protections of every state include some form of an "injustice exception" that allows for discovery. "While the precise wording varies from state to state, the injustice exceptions substantially suggest that trade secret privilege from discovery exists only 'if the allowance of the privilege will not tend to conceal fraud or otherwise work injustice.'"<sup>152</sup>

Thus, courts have a number of tools at their disposal to not only allow source code discovery in the first place (permission by statute or Rule 501), but also to protect the legitimate economic interests of developers. Once discovery is compelled, courts have several safeguards to protect developers' business interest: courts can conduct in camera review, issue protective orders, seal records, threaten sanctions for improper disclosure, or require the parties to mutually agree on a third-party to review the source code.<sup>153</sup> Unfortunately, courts rarely use these tools and instead typically deny discovery altogether.<sup>154</sup>

The California Court of Appeals, reasoning in *People v. Superior Court (Chubbs)*, typifies how courts often hold that discovery of the source code itself requires meeting a high burden that the source code will assist the defense where no other unprotected information will. In that case, Martell Chubbs was charged with murder on the basis of a DNA result that would on average match randomly 1 in 10,000 times.<sup>155</sup> At trial, however, the prosecution put forward a different analysis that put the match as randomly occurring on

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<sup>150</sup> *Id.* at 125 ("Although Congress balked at enacting the draft rule, many states have done so; regardless, the federal courts have recognized the privilege by common-law process under Federal Rule 501.").

<sup>151</sup> *Id.* at 126.

<sup>152</sup> Chessman, *supra* note 19, at 212 (quoting JEROME G. SNIDER ET AL., CORPORATE PRIVILEGES AND CONFIDENTIAL INFORMATION § 8.02[1] (2011)).

<sup>153</sup> *See id.* at 213. Many other forms of protection are also possible. In civil cases, courts have issued the following protective orders, inter alia: The opposing party's experts could examine the trade secret information only in a secure room; to gain access to the secure room, the experts had to identify themselves by iris and palm-print scans; during their examination of the information, the experts had to use paper bearing tags emitting radio waves to determine how many pages of notes the experts had used; counsel and the experts had to sign declarations that they would access the data only for use in the present litigation; and the trial courtroom would be closed to the public during any testimony discussing the trade secret information. *Id.*

<sup>154</sup> Imwinkelried, *supra* note 128, at 126–27.

<sup>155</sup> *People v. Superior Court*, No. B258569, slip op. at 3 (Cal. Ct. App. Jan. 9, 2015).

average 1 in 1.62 quintillion times.<sup>156</sup> Chubbs sought the source code of the subsequent program to account for the discrepancy and examine the assumptions built into the software.

The Court of Appeals held that source code is a trade secret and that it could be discoverable only by making “a prima facie, particularized showing” that the source code would be relevant and necessary to a defense.<sup>157</sup> The court concluded that Chubbs had not met that burden. The court reasoned that Chubbs had already received extensive information regarding the program’s methodology and underlying assumptions from materials other than the source code.<sup>158</sup> Unfortunately, the appellate court did not explain how Chubbs could make the particularized showing it demanded or what would constitute sufficient particularity to overcome the trade secret protection.<sup>159</sup>

## V. ADMISSIBILITY UNDER THE CONSTITUTION

Several constitutional provisions may be implicated by machine learning identification in criminal prosecutions. Defendants may cite the Fifth Amendment’s Due Process Clause<sup>160</sup> or the Sixth Amendment’s Confrontation Clause.<sup>161</sup> Some will likely provide little protection to

<sup>156</sup> *Id.* at 3–4.

<sup>157</sup> *Id.* at 10.

<sup>158</sup> *Id.* at 21. This argument, that the defendant’s access to other records, checklists for operation, and use manuals is sufficient to challenge the evidentiary weight of the device, is a common refrain in the courts. However, Professor Imwinkelreid argues these types of records are not nearly as informative as the source code. Commenting on similar reasoning of the Court in *People v. Robinson*, 860 N.Y.S.2d 159 (N.Y. App. Div. 2008), Professor Imwinkelreid argues:

Those records do not contain the same information that an examination of the software’s source code would yield. The analyst’s checklist might minimize the risk of human error in conducting a test at a specific time and place, but the checklist provides no insight into any inherent defects in the program logic. Likewise, maintenance records could prove that for a certain period after a maintenance the device was operating as intended; but again, even if the device was operating as intended, there might be a defect buried in the source code. In sum, the discoverability of those documents does not undercut the case for discovery of the source code.

Imwinkelreid, *supra* note 128, at 120.

<sup>159</sup> Chessman, *supra* note 19, at 199 (“The appellate court did not explain how Mr. Chubbs could make the particularized showing it demanded without access to the source code, nor did it identify what showings would constitute sufficient particularity.”).

<sup>160</sup> The Fifth Amendment’s Self-Incrimination Clause, and the Supreme Court’s relevant jurisprudence, almost surely would allow prosecutors to require suspects to have recordings of their voice, images of their face, or other identifiers to be collected and fed into a machine learning algorithm, and hence this issue is not extensively discussed in this Comment. In short, because *Schmerber v. California* holds that only “testimony” may not be compelled under the Fifth Amendment, the state may compel physical evidence and identifiers that could be fed into the algorithm. 384 U.S. 757, 764 (1966).

<sup>161</sup> There is much to explore with machine learning in the Fourth Amendment context that is mostly

defendants who wish to exclude inculpatory machine learning evidence, such as the Fifth Amendment. The Sixth Amendment, meanwhile, will almost surely require the evidence to be admitted in the form of expert testimony but will not bar it entirely.

#### A. Due Process Under the Fifth Amendment

Machine learning output is often inexplicable, and experts sometimes cannot explain how the machine came to a particular conclusion.<sup>162</sup> On this basis, defendants may argue that such “guilt by black box” violates the Fifth Amendment’s Due Process Clause<sup>163</sup> because, *arguendo*, “it offends some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental.”<sup>164</sup> This “fundamental principle” may be that the inculpatory evidence must have some kind of discernible logic, explanation, ability to be examined or challenged. However, defendants making this argument will have little chance of success, at least as free-standing due process precedent currently exists.

Two background norms govern the Supreme Court’s consideration of free-standing due process. First, where all the specific guarantees of the Bill of Rights have been observed and a guilty verdict has been reached, the Court typically finds that the defendant has thus enjoyed “all the process that is due.”<sup>165</sup> “Where a particular Amendment ‘provides an explicit textual

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outside the scope of this Comment. See generally Melanie Reid, *Rethinking the Fourth Amendment in the Age of Supercomputers, Artificial Intelligence, and Robots*, 119 W. VA. L. REV. 863 (2017) (offering a new perspective on Fourth Amendment protections in the age of machine learning). However, there may be conceivable instances where a defendant would try to cite the Fourth Amendment as a bar to inculpatory evidence derived from machine learning processes. For example, to echo the facts of *Maryland v. King*, an individual may be arrested for one crime and have his photo taken, voice recorded, or cheek swabbed to gather data that would be fed into a machine learning algorithm, which could then identify and tie the arrestee to past unsolved crimes. 569 U.S. 435, 441 (2013). The Supreme Court held in *King* that a very similar situation was undoubtedly a search, and indeed one performed without individualized suspicion. *Id.* at 446, 448. But the Court ultimately held that it did not violate the Fourth Amendment because the state’s interest in identifying perpetrators of past crimes outweighed the relatively non-invasive nature of a cheek swab for an arrestee. *Id.* at 453. Indeed, the mere photographic identification that would likely be employed in at least some machine learning analysis is undoubtedly even less invasive than that. “[W]e have never held that merely taking a person’s photograph invades any recognized ‘expectation of privacy.’” *Id.* at 477 (Scalia, J., dissenting) (quoting *Katz v. United States*, 389 U.S. 347 (1967)). Thus, defendants would likely find little help in the Court’s Fourth Amendment jurisprudence to exclude machine learning evidence procured and used in this way.

<sup>162</sup> For a more detailed look at explainability problems in machine learning, see *infra* Section VI.C.

<sup>163</sup> “No person shall be . . . deprived of life, liberty, or property, without due process of law.” U.S. CONST. amend. V.

<sup>164</sup> *Medina v. California*, 505 U.S. 437, 445 (1992).

<sup>165</sup> Daniel J. Steinbock, *Data Matching, Data Mining, and Due Process*, 40 GA. L. REV. 1, 23 (2005) (“Although the Due Process Clause provides a general baseline of fundamental fairness in the

source of constitutional protection’ against a particular sort of government behavior, ‘that Amendment, not the more generalized notion of ‘substantive due process,’ must be the guide for analyzing these claims.’”<sup>166</sup> Second, beyond enumerated protections in the Bill of Rights, whatever remaining protections are afforded by the free-standing Due Process Clause are “to be construed narrowly,” and the Court has consistently declined to expand its scope, especially when doing so would interfere with the law enforcement powers of the states.<sup>167</sup>

No specific guarantee of the Bill of Rights regulates the admissibility of evidence, but the Due Process Clause does in very limited circumstances.<sup>168</sup> The Court currently recognizes only two forms of “bad evidence” that “invalidate the defendant’s conviction on due process grounds.”<sup>169</sup> One is “government-induced perjury”<sup>170</sup> and the other is “identification testimony from a suggestive lineup.”<sup>171</sup> “Admission of such evidence, in the Court’s view, is fundamentally unfair and violates due process.”<sup>172</sup> This analysis, however, only demonstrates that free standing due process is the proper inquiry to evaluate evidence; once the Court is operating within that doctrine, defense counsel would face severe headwinds in trying to establish a free standing due process right to exclude machine learning evidence.

To do so, the defendant would have to show that machine learning evidence “offends some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental.”<sup>173</sup> The inquiry of

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criminal process, the Supreme Court has repeatedly held that where a more specific provision of the Bill of Rights applies, that provision constitutes all the process that is due.”); *see also* Jerold H. Israel, *Free-Standing Due Process and Criminal Procedure: The Supreme Court’s Search for Interpretive Guidelines*, 45 ST. LOUIS U. L.J. 303, 399 (2001) (“The range of regulation imposed under free-standing due process could also be restricted by giving a preemptive impact to the incorporated specific guarantees of the Bill of Rights.”).

<sup>166</sup> *Albright v. Oliver*, 510 U.S. 266, 273 (1994) (citing *Graham v. Connor*, 490 U.S. 386, 395 (1989)).

<sup>167</sup> Israel, *supra* note 165, at 387 (“The Court’s decisions in the post-incorporation era have, indeed, considered several major reformulations of due process doctrine as applied to criminal procedure, with some accepted and some rejected. The most important of these involved: (1) characterizing free-standing due process as a disfavored concept to be construed narrowly . . . .”). *But see id.* at 389–97 (questioning how truly “limited” free standing due process is by listing the “extraordinary range” of approximately fifty-one different due process protections the Court has found throughout the typical criminal adjudication timeline).

<sup>168</sup> Alex Stein, *Constitutional Evidence Law*, 61 VAND. L. REV. 65, 86 (2008) (“The Due Process Clause of the Fifth and the Fourteenth Amendments provides the framework for testing evidence rules for constitutionality.”).

<sup>169</sup> *Id.* at 88 (“Today’s constitutional doctrine holds that bad evidence may invalidate the defendant’s conviction on due process grounds.”).

<sup>170</sup> *Id.* at 89 (citing *Mooney v. Holohan*, 294 U.S. 103, 110, 112–13 (1935)).

<sup>171</sup> *Id.* (citing *Foster v. California*, 394 U.S. 441, 442–43 (1969)).

<sup>172</sup> *Id.*

<sup>173</sup> *Medina v. California*, 505 U.S. 437, 445 (1992).

what is “ranked as fundamental” is hardly scientific. Courts must “test the fundamental nature of a right within the context of that *common law* system of justice, rather than against some hypothesized ‘civilized system’ or some foreign system growing out of different traditions.”<sup>174</sup> Thus, a right is fundamental if it “is necessary to an Anglo-American regime of ordered liberty.”<sup>175</sup>

A defendant’s most apparent argument would be, first, as a threshold matter, that the common law tradition has always required evidence that is explainable, bears discernible logic, and may be examined or challenged; and second, that machine learning evidence does not fit that mold because oftentimes experts cannot discern how the machine made a particular determination. Unfortunately, a defendant would have difficulty demonstrating a long-established recognition at common law that evidence must be *fully* explainable. Then, even if the Court recognized such a view, it is not clear machine learning evidence would meet that definition, as its processes, methodology, data, and assumptions can, if not fully, be *mostly* explained and understood. Machine learning does have logical, scientific, and mathematical principles; and while it does make errors, such rates of error are knowable.<sup>176</sup> Moreover, machine learning output would likely be introduced in the form of expert testimony,<sup>177</sup> meaning the defendant would have the opportunity to cross-examine an expert on the machine’s capabilities and processes.

The Wisconsin Supreme Court in *Loomis* examined an issue that bears some resemblance to the above due process inquiry, though different from the issue of substantive evidence at trial. After pleading guilty to several offenses related to a drive-by shooting, Loomis appeared for his sentencing hearing,<sup>178</sup> and in determining his sentence, the court relied on a report generated by COMPAS, one of the most popular risk assessment tools in the United States.<sup>179</sup>

Loomis challenged his sentencing determination in part on due process grounds, arguing that he and the sentencing judge knew little about how the algorithm worked or the extent to which it relied on his gender in making a risk estimation.<sup>180</sup> In essence, he argued, it was black-box sentencing, thus

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<sup>174</sup> Israel, *supra* note 165, at 384 (emphasis added).

<sup>175</sup> *Id.* (quoting *Duncan v. Louisiana*, 391 U.S. 145, 149 n.14 (1968)).

<sup>176</sup> For discussions of machine learning and error rates, see *supra* Parts III and IV.

<sup>177</sup> See *supra* Part IV.

<sup>178</sup> *State v. Loomis*, 881 N.W.2d 749, 754 (Wis. 2016).

<sup>179</sup> Julia Angwin et al., *Machine Bias*, PROPUBLICA (May 23, 2016), <https://www.propublica.org/article/machine-bias-risk-assessments-in-criminal-sentencing> (“Northpointe’s software is among the most widely used assessment tools in the country.”).

<sup>180</sup> *Loomis*, 881 N.W.2d at 765 (“Loomis asserts that because COMPAS risk scores take gender into



offending his due process right to be sentenced on the basis of accurate information.<sup>181</sup> The court conceded that, due to trade secret protections, neither it nor the parties understood fully how the algorithm worked or the extent to which gender was a factor.<sup>182</sup> Yet the court ultimately decided that because Loomis could challenge the inputs and outputs of the algorithm—that is, the data that went in and the conclusions drawn from it—he had sufficient basis to challenge the algorithm even without knowing the extent of its internal processes,<sup>183</sup> and thus he enjoyed due process. As for the use of gender, the court concluded that the use of gender worked to promote the accuracy of the algorithm’s conclusions, which satisfied due process.<sup>184</sup>

Again, *Loomis* is instructive insofar as the Wisconsin Supreme Court was evaluating due process rights in the context of unknown algorithmic processes, but it was not a case of machine learning or evidence at trial. Even so, *Loomis* shows courts’ reluctance to find new due process rights in black box, algorithmic evidence. When machine learning evidence is used at trial to help prove guilt beyond a reasonable doubt, courts may echo the *Loomis* decision and similarly find due process satisfied when (1) the defendant can at least challenge the data that go into the algorithm (a requirement that can be addressed with procedural rules and discovery wholly within the Court’s control) and (2) the algorithm possesses some sufficient level of accuracy, which can come to light at a *Daubert* hearing on admissibility on cross-examination at trial.

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account, a circuit court’s consideration of a COMPAS risk assessment violates a defendant’s due process right not to be sentenced on the basis of gender.”).

<sup>181</sup> *Id.* at 760 (“It is well-established that a defendant has a constitutionally protected due process right to be sentenced upon accurate information.” (internal citations omitted)). *See also id.* (“The plurality opinion [in *Gardner*] concluded that the defendant ‘was denied due process of law when the death sentence was imposed, at least in part, on the basis of information which he had no opportunity to deny or explain.’” (citing *Gardner v. Florida*, 430 U.S. 349, 351 (1977))).

<sup>182</sup> *Id.* at 761 (“Northpointe, Inc., the developer of COMPAS, considers COMPAS a proprietary instrument and a trade secret. Accordingly, it does not disclose how the risk scores are determined or how the factors are weighed.”).

<sup>183</sup> *Id.* at 761–62 (“Loomis had an opportunity to challenge his risk scores by arguing that other factors or information demonstrate their inaccuracy.”).

<sup>184</sup> *Id.* at 766 (“Likewise, there is a factual basis underlying COMPAS’s use of gender in calculating risk scores. Instead, it appears that any risk assessment tool which fails to differentiate between men and woman will misclassify both genders.”).

### B. Confrontation Under the Sixth Amendment

When the prosecution seeks to admit machine learning evidence, it is likely that the Sixth Amendment's Confrontation Clause would require an expert to testify in-person and be subject to cross examination.<sup>185</sup> Analogously, when other forms of machine evidence have been used in prosecution, the Supreme Court has held that, under the Sixth Amendment, the results may not be admitted without an expert subject to cross examination.

Indeed, the manner in which the Sixth Amendment requires expert witnesses to testify on drug analysis evidence may provide a framework for how machine learning experts would be required to testify in prosecutions.<sup>186</sup> Similar to how lab scientists are required to testify in-person and be subject to cross examination, it is likely that a machine learning expert would also have to appear in person to admit inculpatory machine learning output into evidence.

## VI. THE WEIGHT OF UNEXPLAINABLE MACHINE LEARNING EVIDENCE

Parts IV and V establish that there is nothing inherently inadmissible about machine learning evidence under the Federal Rules of Evidence, the Fifth Amendment, or the Sixth Amendment. Yet, assuming the machine learning evidence is admissible, “there can be significant remaining questions about the weight and believability of the evidence.”<sup>187</sup> Indeed, when judges rule on the admissibility of scientific evidence, they are expressly playing the role of gatekeeper and rejecting only evidence that is not the product of reliable principles and methods.<sup>188</sup> Rejecting scientific evidence seems to be exception rather than the norm, in keeping with the Supreme Court's observation that the Federal Rules of Evidence are construed to be liberal and permissive.<sup>189</sup> In fact, Professors Helland and Klick conclude “there is virtually no systematic evidence supporting the view that adoption of *Daubert*

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<sup>185</sup> U.S. CONST. amend. VI (“In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him . . .”).

<sup>186</sup> See *Melendez-Diaz v. Massachusetts*, 557 U.S. 305, 316–18 (2009) (reasoning that any perceived objectivity in scientific evidence does not render it immune from the Confrontation Clause); see also Erick J. Poorbaugh, Note, *Interfacing Your Accuser: Computerized Evidence and the Confrontation Clause Following Melendez-Diaz*, 23 REGENT U. L. REV. 213, 229 (2010) (“Although the Supreme Court in *Melendez-Diaz* stated that the ‘witnesses’ in that case were ‘the analysts,’ it did not specify which of the analysts must testify (or whether they all must testify).”).

<sup>187</sup> Imwinkelried, *supra* note 128 at 118.

<sup>188</sup> See *Daubert v. Merrell Dow Pharm., Inc.*, 509 U.S. 579, 597 (1993) (referring to a “gatekeeping role for the judge”).

<sup>189</sup> See Imwinkelried, *supra* note 128, at 118 (“[T]he Court . . . characterized the general spirit of the Federal Rules as ‘liberal’ and ‘permissive.’”).

makes any difference at all” in keeping “junk science” out of the courtroom.<sup>190</sup> Thus, for the oft-admitted “shaky but admissible evidence,” as Justice Blackmun put it in *Daubert*, “[v]igorous cross-examination, presentation of contrary evidence, and careful instruction on the burden of proof” are the principal tools for swaying the trier of fact.<sup>191</sup>

For three reasons, these burdens for the counsel who aims to discount the persuasiveness of the “shaky but admissible evidence” are likely greater in the criminal context than in the civil liability context that Justice Blackmun was presiding over in *Daubert*. First, as practitioners have observed, “the appellate courts appear to be more willing to second-guess trial court judgments on the admissibility of purported scientific evidence in civil cases than in criminal cases.”<sup>192</sup> That is, courts seem to be less demanding or rigorous of scientific evidence in criminal cases, which, to the dissatisfaction of many, has often included “shaky” evidence like handwriting analysis, hair comparisons, fingerprint examinations, firearms identifications, bitemark analysis, and intoxication testing.<sup>193</sup> Most challenges to admissibility of these types of evidence have been unsuccessful, even while exposing “the lack of empirical support for many commonly employed forensic techniques.”<sup>194</sup> Second, machines are often afforded a presumption of reliability that can make them unduly persuasive to a lay person.<sup>195</sup> And third, once a trial court rules that evidence is admissible, the appellate courts are highly deferential to that decision, and only review under an abuse of discretion standard.

Given that state of affairs, losing the admissibility battle puts considerable onus on trial counsel to persuade the trier of fact to discount the weight that the evidence should be assigned. Jurors might be cautious to assign much weight to machine learning evidence because of its peculiar property that it is often not explainable.

That is, even if one has cleared the above trade secret hurdles, probed the data, and examined the source code, often no one can explain how or why a machine learning algorithm reached a particular result, which may (or may not) significantly reduce the weight it is assigned by the trier of fact. Regardless of machine learning’s potential use in litigation specifically, this issue is severe because machine learning could be useful in many areas that

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<sup>190</sup> Eric Helland & Jonathan Klick, *Does Anyone Get Stopped at the Gate? An Empirical Assessment of the Daubert Trilogy in the States*, 20 SUP. CT. ECON. REV. 1, 32 (2012).

<sup>191</sup> *Daubert*, 509 U.S. at 596.

<sup>192</sup> NAT’L RES. COUNCIL, STRENGTHENING FORENSIC SCIENCE IN THE UNITED STATES: A PATH FORWARD 11 (2009).

<sup>193</sup> *Id.* at 94, 104, 107–08, 117–18.

<sup>194</sup> 1 COURTROOM CRIMINAL EVIDENCE § 614 (6th ed. 2016).

<sup>195</sup> Kroll et al., *supra* note 4, at 680 (“[D]ecisions made by computers may enjoy an undeserved assumption of fairness or objectivity.”).

require ex post rationale and explanation.<sup>196</sup> Given the present state of the technology, it is foreseeable that when machine learning begins to produce substantive evidence in litigation, an expert witness on the stand—perhaps even the individual who created the machine learning algorithm at issue—would not be explain how exactly it yielded the inculpatory results. This unexplainability may even be machine learning’s most concerning feature to jurors and lead them to discount the weight it should be afforded.

#### A. *Examples of Inexplicable Machine Learning*

To illustrate how this problem manifests, consider the earlier example of a programmer who is training a machine learning algorithm to recognize her mother’s face in photographs.<sup>197</sup> As explained, the algorithm could be identifying the mother by means that humans do, such as recognizing the collection of features in the height and width of the face, shape of the head and hair, and so on.<sup>198</sup> But sometimes the machine might establish correlations and rules that are not apparent at first glance or that humans would not use. For instance, if the machine has only ever learned from images in which the mother was photographed with flash on, the machine may use the brightness of the image as a basis to identify the mother, and with more weight than any attribute about her face.<sup>199</sup> If this were the case, when the machine later must confront an image of the mother in which she was not photographed with flash, the machine might not be able to identify her (a false negative), even though humans would not be confused by such a situation. Conversely, the machine might mistakenly identify as the mother an entirely different woman who was photographed with flash (a false

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<sup>196</sup> These areas include, but are not limited to, national security. See Cliff Kuang, *Can A.I. Be Taught to Explain Itself?*, N.Y. TIMES (Nov. 21, 2017), <https://www.nytimes.com/2017/11/21/magazine/can-ai-be-taught-to-explain-itself.html> (quoting a national security analyst’s legal need for explainable AI decisions, “If I’m going to sign off on a decision, I need to be able to justify it.”).

<sup>197</sup> For an initial discussion of this example, see *supra* Section II.B. This particular example is hypothetical and is only offered to illustrate the general issue that machines can, and do, learn unforeseen rules. It is not from a specific study.

<sup>198</sup> See Murphy, *supra* note 56 (“The software extracts information from thousands of facial data points, including nose width, mustache shape, eyebrows, corners of the mouth, hairline and even aspects of the face we don’t have words for. It then turns the faces into numbers.”).

<sup>199</sup> Machine learning researchers are well aware of this issue and have confronted it in a variety of contexts:

Tomaso Poggio, the director of M.I.T.’s Center for Brains, Minds and Machines, offered a classic parable used to illustrate this disconnect. The Army trained a program to differentiate American tanks from Russian tanks with 100 percent accuracy. Only later did analysts realize that the American tanks had been photographed on a sunny day and the Russian tanks had been photographed on a cloudy day. The computer had learned to detect brightness.

*Id.*

positive). In such a scenario, the machine learned a correlation that was undoubtedly accurate within the universe of data it was initially shown, but not one that would be reliable for all varying situations. This is a common problem with the rules that machines learn.<sup>200</sup>

Whether the machine is deducing obvious rules (like facial attributes) or non-obvious and potentially unreliable rules (like brightness in an image) is impossible to predict *ex ante* and discovering what rules the machine has deduced sometimes requires considerable extra research for the programmer. Indeed, what rules and correlations the machine deduces may forever remain a mystery.

This principle was at work in a recent Stanford University study that aimed to build a machine learning algorithm that could analyze a person's face and determine that person's sexual orientation.<sup>201</sup> Specifically, researchers compiled images of 75,000 users' faces from various dating sites and used the profiles' self-reported gay or straight identification to train the algorithm.<sup>202</sup> From this pool of data, the algorithm focused on 35,000 images of 15,000 users to learn a set of correlations between the content of the images and the labels "gay" and "straight." Later, in a test set of different images that the machine had never seen before, the algorithm would make its best guess.<sup>203</sup> The program was remarkably accurate at determining straight versus gay men, at eighty-one percent accuracy, and slightly less accurate at sorting gay versus straight women, at seventy-one percent.<sup>204</sup> Meanwhile, the machine was far more accurate than humans, who only correctly determined male sexual orientation sixty-one percent of the time and that of women fifty-four percent of the time.<sup>205</sup>

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<sup>200</sup> See Hubert L. Dreyfus & Stuart E. Dreyfus, *What Artificial Experts Can and Cannot Do*, 6 AI & SOC'Y 18, 21 (1992) (further explaining the same American-Russian tank example). The issue can even lead to needless deaths in emergency situations:

[One algorithm created to better triage emergency room patients] seemed to show that asthmatics with pneumonia fared better than the typical patient. This correlation was real, but the data masked its true cause. Asthmatic patients who contract pneumonia are immediately flagged [by doctors] as dangerous cases; if they tended to fare better, it was because they got the best care the hospital could offer. A dumb algorithm, looking at this data, would have simply assumed asthma meant a patient was likely to get better—and thus concluded that they were in less need of urgent care. . . . The story of asthmatics with pneumonia eventually became a legendary allegory in the machine-learning community.

Kuang, *supra* note 196.

<sup>201</sup> See Murphy, *supra* note 56.

<sup>202</sup> Yilun Wang & Michael Kosinski, *Deep Neural Networks Are More Accurate than Humans at Detecting Sexual Orientation from Facial Images*, 114 J. PERSONALITY & SOC. PSYCHOL. 246, 248 (2018).

<sup>203</sup> *Id.* at 249.

<sup>204</sup> *Id.* at 250.

<sup>205</sup> *Id.* at 253.

As to *how* the algorithm was making its relatively accurate determinations, the researchers could only speculate. One of their hypotheses was that the levels of different hormones in gay versus straight users (the prenatal hormone theory of sexual orientation<sup>206</sup>) might have manifested some minute differences in their respective facial structures, differences unseen by the human eye but detectable by the algorithm.<sup>207</sup> One researcher explained, “[h]umans might have trouble detecting these tiny footprints that border on the infinitesimal” but “[c]omputers can do that very easily.”<sup>208</sup> With respect to men, presence of facial hair or baseball caps also probably played a role for some images.<sup>209</sup> In other similar tests, researchers found that the images of gay men usually were better quality and had better lighting, and the algorithm may have used that as the basis to conclude the sexual orientation.<sup>210</sup> Yet, the author of the Stanford study concedes that he could not say with certainty how the algorithm made its determinations.<sup>211</sup>

### B. *Why Machine Learning Is Unexplainable*

Machine learning is often unexplainable because of the sheer number of data points involved and “avalanche of statistical probability” involved.<sup>212</sup> Many techniques are at play or constantly being developed, and choosing among them can be the whim or preference of the programmer. “The sheer proliferation of different techniques, none of them obviously better than the others, can leave researchers flummoxed over which one to choose. Many of the most powerful are bafflingly opaque; others evade understanding because they involve an avalanche of statistical probability.”<sup>213</sup>

Responding to that deficiency is an entirely new subfield of machine learning research, dubbed “xAI,” for “explainable AI.”<sup>214</sup> The Defense

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<sup>206</sup> The prenatal hormone theory is commonly circulated but controversial in both the scientific and LGBT advocacy communities. See Louis Hoffman & Justin Lincoln, *Science, Interpretation, and Identity in the Sexual Orientation Debate: What Does Finger Length Have to Do With Understanding a Person?*, 56 PSYCRITIQUES, Apr. 13, 2011, [http://psqtest.typepad.com/blogPostPDFs/201103880\\_psq\\_56-15\\_scienceInterpretationAndIdentifyInTheSexualOrientationDebate.pdf](http://psqtest.typepad.com/blogPostPDFs/201103880_psq_56-15_scienceInterpretationAndIdentifyInTheSexualOrientationDebate.pdf) (reviewing SIMON LEVAY, *GAY, STRAIGHT, AND THE REASON WHY: THE SCIENCE OF SEXUAL ORIENTATION* (2011) and commenting on the controversy surrounding the introduction of science into politically charged areas such as sexual identity).

<sup>207</sup> Wang & Kosinski, *supra* note 202, at 246.

<sup>208</sup> Kuang, *supra* note 196.

<sup>209</sup> See Murphy, *supra* note 56 (showing that the algorithm looked at factors like grooming habits).

<sup>210</sup> *Id.*

<sup>211</sup> Kuang, *supra* note 196.

<sup>212</sup> *Id.*

<sup>213</sup> *Id.*

<sup>214</sup> See, e.g., Mark G. Core et. al., *Building Explainable Artificial Intelligence Systems*, 21 PROC. NAT’L CONF. ARTIFICIAL INTELLIGENCE 1766, 1766 (2006) (setting forth a modular and generic architecture for

Department's Defense Advanced Research Projects Agency ("DARPA") is currently conducting research into how AI technologies can explain their decision-making processes, though the field is still in its infancy.<sup>215</sup> Thus, for the foreseeable future, any machine learning output that is admitted into evidence bears a substantial likelihood that it will be unexplainable.

### C. Comparing Machine Learning to Current Unexplainable Evidence

Few analogs exist to this problem in other forms of evidence used at trial. When scholars write about "black boxes" and evidence, they typically mean to highlight the fact that lay jurors do not fully understand how the device works—the implicit assumption is that experts do. But as machine learning exists now, that assumption is faulty, since experts often cannot fully account for machine learning determinations, in spite of the machine's demonstrable accuracy for certain tasks.

Professor Rich analogizes algorithms to another black box with which courts are very familiar in the Fourth Amendment sphere: drug dogs. With drug sniffing dogs just as in algorithms, "we know the inputs, and we receive the outputs, but we cannot fully understand how the internal mechanism works."<sup>216</sup> Professor Rich argues that treating algorithms in the way that we do dogs will allow "courts and police to ignore what they are ill-equipped to evaluate," namely, how an algorithm works, and focus only on the accuracy of its outcomes.<sup>217</sup> Professor Rich's analogy is limited, however, to how algorithms may be used to develop reasonable suspicion or probable cause, and does not speak to admissibility or weight.

A closer analogy might be "super recognizers,"<sup>218</sup> or humans with the uncanny ability to recognize even the most blurry or corrupted images of a face to aid in investigations.<sup>219</sup> The super recognizer essentially exploits two

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explaining the behavior of simulated entities); David Gunning, *Explainable Artificial Intelligence (XAI)*, DARPA/I20, <https://www.darpa.mil/program/explainable-artificial-intelligence> (last visited Jan. 5, 2018) (arguing that explainable AI is necessary if users are to understand, trust, and effectively manage new AI).

<sup>215</sup> Gunning, *supra* note 214.

<sup>216</sup> Rich, *supra* note 11, at 912.

<sup>217</sup> *Id.* at 919.

<sup>218</sup> See Richard Russell et al., *Super-recognizers: People with Extraordinary Face Recognition Ability*, 16 PSYCHONOMIC BULL. & REV. 252, 252 (2009) (defining the term super-recognizers).

<sup>219</sup> Anna K. Bobak & Sarah Bate, *Superior Face Recognition: A Very Special Super Power*, SCI. AM. (Feb. 2, 2016), <https://www.scientificamerican.com/article/superior-face-recognition-a-very-special-super-power/> ("London's Metropolitan Police have created a super-recogniser unit that is used to spot criminals in a crowd or within CCTV footage. . . . It's easy to spot other potential roles for super-recognisers—issues of national security are currently paramount, and they may spot wanted or missing people more readily than typical officers.").

capabilities in tandem. First is the ability to remember a face after de minimis exposure, and second is the ability to recognize it in subsequent situations. How exactly a super recognizer memorizes the face with such precision is a mystery. One hypothesis was that super recognizers holistically evaluate a face differently than the average layperson, though that possibility was debunked in subsequent research.<sup>220</sup> Another hypothesis was that super recognizers spend longer than average looking at the eyes,<sup>221</sup> though subsequent research showed they actually spend more time focusing on the nose and center of the face.<sup>222</sup> In any case, the super recognizers cannot themselves articulate how their ability works, nor can other researchers provide a comprehensive explanation. The super recognizers are a human black box.

If a super recognizer were to testify at trial on the basis of her abilities and give inculpatory evidence, it would perhaps give some kind of analog to how a testifying expert cannot account for how a machine learning algorithm made the same kind of facial recognition determination. At present, however, there is no documented use of a super recognizer testifying at trial, and thus no instance of how a judge rationalized the admissibility of one's testimony, to say nothing of how jurors assigned it weight and credibility.<sup>223</sup>

#### *D. Jurors' Trust in Unexplainable Machine Learning Evidence*

It is an entirely open question the extent to which, in open court, jurors would trust the validity of unexplainable machine learning evidence. Indeed, this question is ripe for empirical research by psychologists and legal scholars of scientific evidence.

Developers understand that the extent to which a person trusts a machine in everyday life is highly variable and context-dependent. Outside the courtroom, an individual's trust in a machine ranges from none or little (for a variety of reasons, one of which is often *because it is a machine*<sup>224</sup>), to passive

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<sup>220</sup> *Id.* (“[O]nly modest links have been reported between face recognition ability and holistic processing skills, suggesting other factors may be at play.”).

<sup>221</sup> *Id.* (“Eye-tracking technology has frequently been used by psychologists to identify the regions of the face that are particularly informative in face recognition. Typical people tend to focus on the eyes, suggesting they carry important information about facial identity.”).

<sup>222</sup> *Id.* (“[S]uper-recognisers spent more time viewing the nose. These findings challenge existing conclusions, suggesting that it is the centre[sic] of the face, rather than the eye region, that is optimal for facial identity recognition.”).

<sup>223</sup> Gary Edmond & Natalie Wortley, *Interpreting Image Evidence: Facial Mapping, Police Familiars and Super-Recognisers in England and Australia*, 3 J. INT'L & COMP. L. 473, 492 (2016) (“So far there are no reported cases involving police super-recognisers as witnesses.”).

<sup>224</sup> Berkeley J. Dietvorst et al, *Algorithm Aversion: People Erroneously Avoid Algorithms After Seeing Them Err*, 144 J. EXPERIMENTAL PSYCHOL. 1, 10 (2014) (“The results of five studies show that seeing



trust in machines without so much as a second thought<sup>225</sup> (when the machine is functioning, that is<sup>226</sup>), and even up to great affirmative trust in a machine *because it is a machine*.<sup>227</sup> Researchers find trust in machines to be highly variable and influenced by different factors like belief about the functionality of the technology, belief that the technology is helpful, and belief that the technology is reliable.<sup>228</sup> Often, trust is dependent on mere different presentations of a technology—such as the inclusion of anthropomorphic qualities, for example<sup>229</sup>—and not by the capabilities of the machine itself.

To be sure, trust itself means different things in different contexts, and the meanings may not necessarily translate from one situation to another. For example, consider voir dire, where a prosecutor hoping to use machine learning output at trial may question potential jurors about their trust in technology in specific situations. It would be risky for the prosecution to assume, say, that a juror's self-reported "trust in technology" would necessarily indicate trust in black-box machine output to prove a defendant's guilt beyond a reasonable doubt. Inside the courtroom, how jurors will respond to machine learning output is very difficult to predict. As Professor Roth summarizes, "juries might irrationally defer to the apparent objectivity

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algorithms err makes people less confident in them and less likely to choose them over an inferior human forecaster.").

<sup>225</sup> See Paul Robinette et al., *Overtrust of Robots in Emergency Evacuation Scenarios*, 11 ACM/IEEE INT'L CONF. HUMAN ROBOT INTERACTION 101, 104 (2016) (finding that in a simulated emergency situation 100% of human test subjects followed a guide robot to safety through the hallways of a building even when the robot led in directions opposite posted exit signs); see also *id.* ("Eighty-five percent of participants indicated that they would follow the robot in a future emergency.").

<sup>226</sup> See Davide Salanitri et al., *Relationship Between Trust and Usability in Virtual Environments: An Ongoing Study*, in HUMAN COMPUTER INTERACTION: DESIGN AND EVALUATION 49, 50 (Masaaki Kurosu ed. 2015) ("A low level of usability could compromise the users' interaction with a product, thus affecting the individual's trust in the technology . . .").

<sup>227</sup> See Jennifer Saranow, *Steered Wrong: Drivers Trust GPS Even to a Fault*, WALL STREET J. (Mar. 18, 2008, 11:59 PM), <https://www.wsj.com/articles/SB120578983252543135> ("If your GPS device told you to drive off a cliff would you do it? Norman Sussman nearly did."); see also *The Office US, Michael Drives into a Lake—The Office US*, YOUTUBE (Aug. 8, 2017) [https://www.youtube.com/watch?v=DOW\\_kPzY\\_JY](https://www.youtube.com/watch?v=DOW_kPzY_JY) (satirizing the enormous trust that drivers have in turn-by-turn GPS navigation by depicting a driver intentionally driving into a lake because "maybe it's a shortcut" and "the machine knows").

<sup>228</sup> Salanitri, *supra* note 226, at 50 ("[T]rust in a technology reflects at least three main beliefs about the attributes of a technology: (i) belief about the functionality of the product, which refers to the capability of a technology to perform specific tasks; (ii) belief that the technology is helpful . . . (iii) Belief that the technology is reliable, hence, the perception that a technology works properly.").

<sup>229</sup> For instance, even though the two technologies provide the same service, first-time passengers report more trust in Tesla's self-driving technology than Google's, owing in part Tesla's incorporation of human-like qualities a voice and a name. Google's, meanwhile, has no anthropomorphic qualities. See Walter Frick, *Tesla, Autopilot, and the Challenge of Trusting Machines*, HARV. BUS. REV. (July 11, 2016), <https://hbr.org/2016/07/tesla-autopilot-and-the-challenge-of-trusting-machines>.

of machines, or reject machine sources because of an irrational mistrust of machines' apparent complexities, even when the sources are highly credible."<sup>230</sup>

Additionally, inextricably linked to the credibility of the machine is the credibility the jurors extend to the testifying expert him- or herself. That human credibility would likely affect credibility that jurors would extend to the underlying machine, especially as the scientific evidence at issue is particularly complex for laypeople.<sup>231</sup> In that case, the prosecution or defense would surely already be familiar with the usual tactics to use to attack the expert's credibility. These tactics include choosing and preparing an expert who (1) appears to lack bias, (2) bears impressive credentials, (3) displays "a pleasant personality," (4) can present "a clear, objective, focused, not overly long presentation that utilizes diagrams and models," (5) uses lay terms, (6) demonstrates knowledge in the area of expertise, (7) gives testimony that is "complete, consistent, and not too complex," and (8) shows familiarity with the instant case.<sup>232</sup> As for attacking credibility, studies seem to show the classic methods are effective. Jurors report less credibility for experts that seem like "hired guns," as in experts that are highly paid and bear sterling credentials.<sup>233</sup> Jurors also distrust witnesses that offer inconsistent statements between depositions and trial testimony.<sup>234</sup>

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<sup>230</sup> Roth, *Testimony*, *supra* note 17, at 2038 (2017); *see also* Hon. Donald E. Shelton et. al., *An Indirect-Effects Model of Mediated Adjudication: The CSI Myth, the Tech Effect, and Metropolitan Jurors' Expectations for Scientific Evidence*, 12 VAND. J. ENT. & TECH. L. 1, 8 (2009) ("Data in the Washtenaw County and Wayne County studies have demonstrated high expectations and demands for scientific evidence among jurors. Other scholars and researchers have found similarly high expectations and regard for scientific evidence by jurors.").

<sup>231</sup> Researchers typically reason that jurors evaluate complicated expert testimony either by (1) evaluating the logic of the testimony itself and trying to understand the underlying science (i.e., "central processing"), or when that is difficult, (2) reverting to shortcuts, heuristics, or other means of evaluating the testimony (i.e., "peripheral processing"), which includes things like the credentials of the expert, how much the expert has been paid, or even the expert's manner of speech or appearance. *See* Sanja Kutnjak Ivkovic & Valerie P. Hans, *Jurors' Evaluations of Expert Testimony: Judging the Messenger and the Message*, 28 LAW & SOC. INQUIRY 441, 448 (2003) ("Cooper and Neuhaus concluded that jurors shifted from central to peripheral processing under cognitively challenging conditions.").

<sup>232</sup> *Id.* at 458.

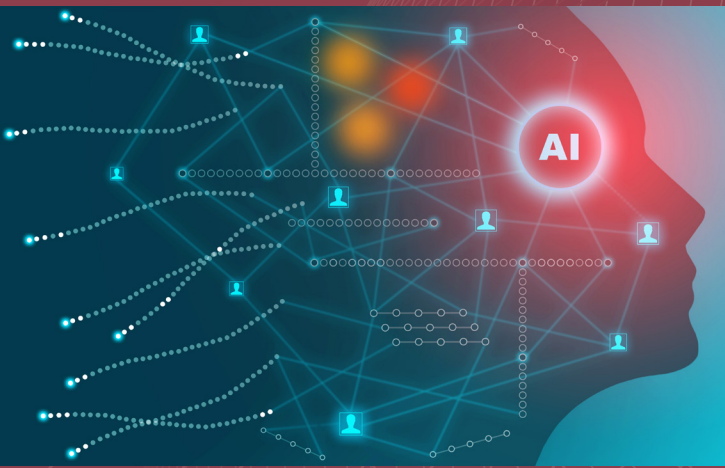
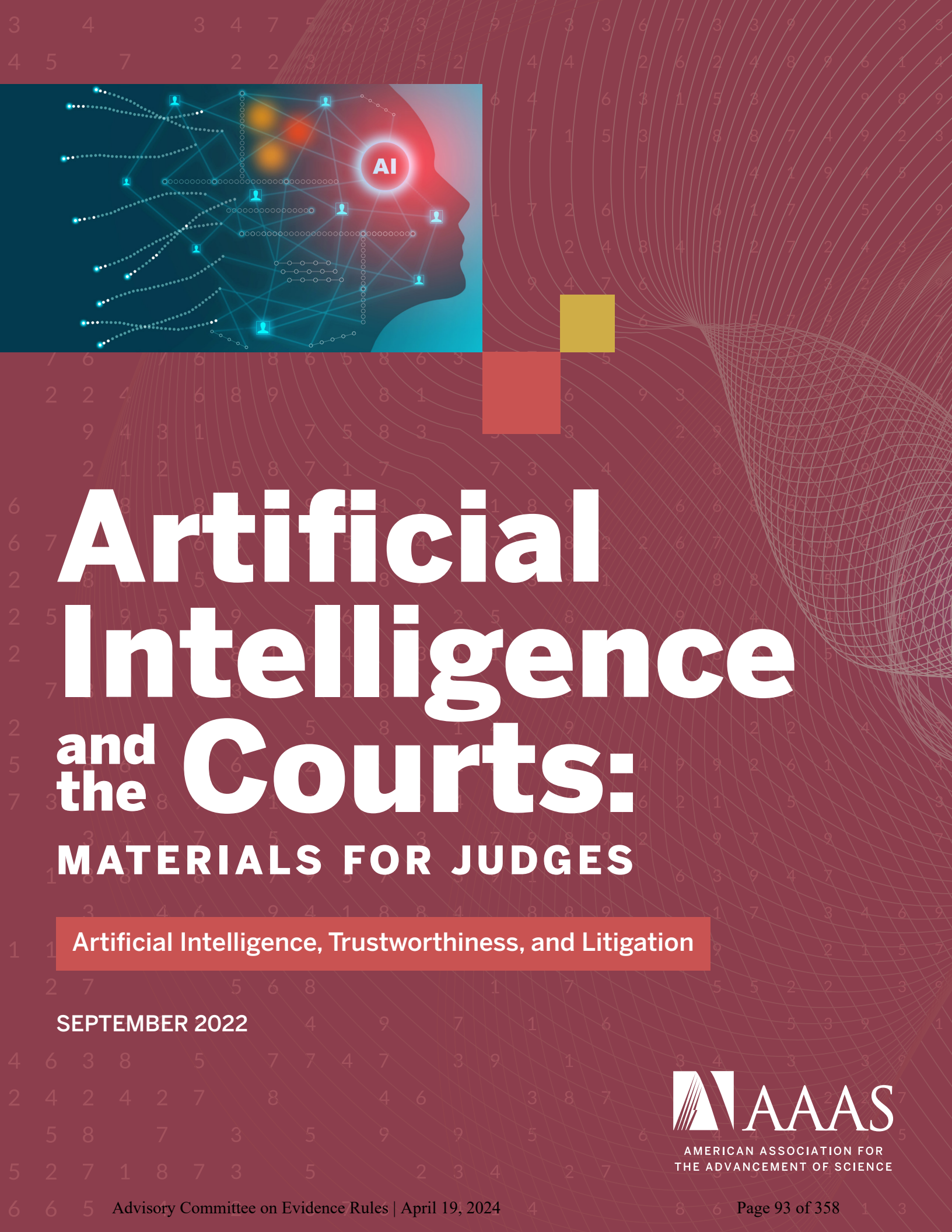
<sup>233</sup> *Id.* at 448 ("[M]ock jurors who heard testimony of a highly paid expert with high credentials—potentially fitting the profile of a hired gun—rated the expert as less likable, less believable, less trustworthy, less honest, and more annoying . . .").

<sup>234</sup> *Id.* at 473 ("This shows that the common litigator tactic of pointing to differences between deposition and trial testimony can be effective in decreasing credibility.").

## CONCLUSION

Machine learning is already in our email clients, our web applications, our law firms, and our government's regulatory agencies. It will soon arrive in our courtrooms, too. When it does, it will only be the latest in a long line of machine evidence that is admitted in spite of the risk of error it carries. While machine learning poses some risks under Federal Rule of Evidence 702—namely that its data must be appropriately compiled and relevant to the given defendant—nothing in the Federal Rules of Evidence inherently bars machine learning output as a form of evidence. For its part, the Constitution and relevant precedent permit machine learning evidence even in spite of its unexplainability, even if the Sixth Amendment merely requires that the evidence be introduced with expert testimony.

# TAB 1D



# Artificial Intelligence and the Courts: MATERIALS FOR JUDGES

Artificial Intelligence, Trustworthiness, and Litigation

SEPTEMBER 2022



## Artificial Intelligence and the Courts: Materials for Judges

The American Association for the Advancement of Science (AAAS) is honored to have been entrusted, by the National Institute of Standards and Technology (NIST), with the task of developing educational materials on artificial intelligence (AI) for judges and courts.

AAAS therefore offers this compilation of educational materials for judges, covering a wide, yet appropriate, set of issues. (Please see the list below). AAAS' goal is to provide a set of user-friendly and accurate, yet readily comprehended, definitions, analyses and perspectives, on a variety of terms and topics with which the judiciary ought to become familiar.

The materials contained herein were developed by teams of scientific and legal experts who focused on a particular topic. The topics considered worthy of inclusion were selected based both on the mandate provided by NIST and guidance received by AAAS from an Advisory Committee composed of a large and diverse group of legal and AI experts. Drafts of the materials were subsequently submitted to Advisory Committee members, and outside expert "Reviewers," to obtain any suggestions for adjustments before each team of authors finalized their contribution (paper, podcast, annex, etc.).

It is not expected that courts will become experts regarding these sometimes complex or technical matters. Rather, this collection presents facts and overviews in a manner intended to make judges aware of key issues and to enable courts to find useful information contained herein, easily.

Finally, it is hoped that courts will appreciate certain innovative elements of this product, notably the inclusion of podcasts. These will provide courts with facts and analysis of important questions in a format that courts may find agreeable and, given the accompanying transcripts included, useful. AAAS thanks NIST for allowing a team of experts to undertake this forward-leaning approach to providing courts with needed information and insights as part of this project.

Materials in this series include:

- 1. *Artificial Intelligence – Foundational Issues and Glossary***
- 2. *Artificial Intelligence and the Justice System (Podcast Series and Transcripts)***
  - Episode 1: *AI and Risk Scores* (49 minutes)
  - Episode 2: *AI in the Legal Field – Commercial and Unexpected Uses* (70 minutes)
  - Episode 3: *AI, Decision-Making, and the Role of Judges* (58 minutes)
- 3. *Artificial Intelligence, Trustworthiness, and Litigation***
- 4. *Artificial Intelligence, Legal Research, and Judicial Analytics***
- 5. *Artificial Intelligence and Bias – An Evaluation***

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## Abstract

Although few court decisions have squarely addressed the admissibility of artificial intelligence (AI) evidence in proceedings governed by the Federal Rules of Evidence, or their state-law equivalents, this paper focuses on key considerations for the use of AI evidence in court cases. The paper defines the concept of “trustworthiness” as being the sum total of a number of interrelated requirements found within the rules of evidence that govern court cases. This section also includes:

- *Annex A: “Practice Pointers for Lawyers and Judges,”* given the complexities and rapid evolution of AI, this Annex offers a handy set of practical questions courts might employ, the better to assess the validity, reliability and/or admissibility of proffered AI-related evidence.
- *Annex B: “Hypothetical on the Admissibility of Facial Recognition Testimony in a Criminal Matter,”* provides a fact-pattern and legal framework for analyzing a scenario of the sort that a court might plausibly encounter.
- *Annex C: “Hypothetical on Measuring a Machine Learning (ML) System’s Accuracy and Reliability—Problem Gambling,”* provides a fact-pattern an Australian court has encountered, as well as sample questions for any court needing to assess ML-related issues.

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# Artificial Intelligence, Trustworthiness, and Litigation

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## 1. Introduction

As **artificial intelligence**<sup>1</sup> (AI) applications<sup>2</sup> become more ubiquitous in different aspects of our lives, it seems unavoidable that the evidence needed to resolve civil litigation and criminal trials will include outputs that are generated by this rapidly evolving technology. Thus, lawyers seeking to introduce or object to AI evidence, and judges who must rule on its admissibility, must have a basic knowledge of what AI is and how it works, and how to evaluate its trustworthiness. This is because, with AI—**machine learning** (ML) in particular—questions about the data on which it was trained (including its representativeness of the population on which the AI will be used), the inner workings of the **algorithm** (including its features and weights) and how the output was derived can all be difficult to explain to judges and juries lacking a background in computer or data science. This can create challenges when evaluating the *trustworthiness* of AI evidence, which, in the context of court cases, means its relevance, **validity**, **reliability** and **authenticity**. Because this section focuses on the use of AI evidence in court cases, we will define the concept of “trustworthiness” as being the sum total of a number of interrelated requirements found within the rules of evidence that govern court cases. For the purposes of this section, AI evidence is sufficiently trustworthy to be introduced into evidence when it meets the requirements of the rules of evidence.<sup>3</sup>

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<sup>1</sup> Bolded red terms appear in the Glossary

<sup>2</sup> Paul W. Grimm, Maura R. Grossman, and Gordon V. Cormack, *Artificial Intelligence as Evidence*, 19 Nw. J. Tech. & Intell. Prop. 9 (2021). Available at: <https://scholarlycommons.law.northwestern.edu/njtip/vol19/iss1/2/>.

By the term “AI,” we mean to refer to computer systems and applications that are capable of performing functions normally associated with human intelligence, such as abstracting, reasoning, problem solving, learning, etc. See *AI as Evidence* at 14-17. Such systems may use one or more algorithms, including, but not limited to, rules-based systems, machine learning, natural language processing, deep learning, and machine vision. While at times in this section we may appear to be referring solely to systems that use machine learning—systems that are “trained” to recognize patterns in data and to derive models that can explain the data or make predictions about other data—this is by way of example, only, and by no means intended as a limitation.

<sup>3</sup> See *AI as Evidence* at 84-97.

There are few, if any, published court opinions that consider issues involving AI admissibility in any depth. Recently, however, governments and other organizations have been working on proposed AI governance frameworks, with the goal of mitigating the risks of AI, and these efforts can provide useful guidance. For example, the U.S. Department of Commerce’s National Institute of Standards and Technology (“NIST”) is developing an AI Risk Management Framework, to provide guidance regarding the trustworthiness of **AI systems**.<sup>4</sup> Specifically, the framework is intended to help to incorporate trustworthiness considerations into the design, development, use and evaluation of AI systems. These trustworthiness characteristics include “accuracy, **explainability** and **interpretability**, reliability, **privacy**, robustness, safety, security (resilience) and mitigation of unintended and/or harmful **bias**, as well as of harmful uses.”<sup>5</sup> Once completed, the NIST framework will likely influence how companies and other organizations approach AI-related risks, and may provide useful context for judges and practitioners concerning AI design and uses when evidence generated by AI-powered software is introduced or objected to in court cases.

For judges who must decide whether to admit AI evidence, it is important to determine the validity of an AI application (i.e., how accurately the AI measures, classifies, or predicts what it is designed to), as well as its reliability (i.e., the consistency with which AI produces accurate results when applied in the same or substantially similar circumstances).<sup>6</sup> Factors that can affect the validity and reliability of AI evidence, include bias of various types, lack of **transparency** and explainability and the sufficiency of the objective testing of the AI application before it is released for public use.<sup>7</sup> Closely related to the problem of inadequate testing and evaluation is the problem of **function creep**, which refers to the gradual widening of the use of a technology or system beyond the use for which it was originally intended, often, but not always, without its proper validation for the new use.<sup>8</sup>

With AI evidence, the significance of validity and reliability, and the factors that impact it, can be different than with other types of evidence. For example, although explainability is often considered to be important when evaluating the validity and reliability of evidence, different considerations may be necessary when evaluating AI evidence, which may be a “**black box**,”<sup>9</sup> or may involve an immense number of data points. *See, e.g.*, K. Miller, *Should AI Models be Explainable? That Depends*, Stanford HAI News (March 16, 2021) (noting that **AI models** that

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<sup>4</sup> NIST, *AI Risk Management Framework Concept Paper*, December 13, 2021, [https://www.nist.gov/system/files/documents/2021/12/14/AI%20RMF%20Concept%20Paper\\_13Dec2021\\_posted.pdf](https://www.nist.gov/system/files/documents/2021/12/14/AI%20RMF%20Concept%20Paper_13Dec2021_posted.pdf).

<sup>5</sup> *See id.*

<sup>6</sup> *See AI as Evidence* at 32 n.92, 49-51, 79-83, 98-99.

<sup>7</sup> *See id.* at 13-14, 42-47, 48-50, 60-65.

<sup>8</sup> *See id.* at 51-53. *See also function creep*, dictionary.com, <https://www.dictionary.com/browse/function-creep> (last visited December 16, 2021).

<sup>9</sup> “In science, computing, and engineering, a black box is a device, system, or object which can be viewed in terms of its inputs and outputs, without any knowledge of its internal workings.” Will Kenton, *Black Box Model*, Investopedia, <https://www.investopedia.com/terms/b/blackbox.asp> (last visited Apr. 24, 2022).

yield accurate predictions that help clinicians better treat their patients can be useful even without a detailed explanation of how or why the models work).

The following subsection will discuss issues that frequently arise during the pretrial phase of litigation (i.e., the discovery phase), where the parties exchange information about the facts that are relevant to resolving the issues raised by the pleadings or charges that have been filed with the court in the case. It will provide an overview of the evidentiary principles that govern whether AI evidence should be admitted in court cases. The focus of this discussion is on providing a step-by-step analysis of the most important issues, and the factors that affect decisions on whether or not to admit AI evidence. The accompanying Annex A includes a summary of practical suggestions intended to assist lawyers and judges as they are called upon to introduce, object to, or decide on whether to admit AI evidence. In Annex B, we provide a hypothetical example involving the admissibility of **facial recognition** technology in a criminal matter, with a discussion of the relevant rules and factors to consider. Finally, Annex C, based on an actual case in Australia, provides sample questions courts anywhere might wish to leverage in cases involving machine learning.

## 2. Admissibility Issues

The Federal Rules of Evidence<sup>10</sup> are amended infrequently, and the process of amendment is slow. In contrast, technology, and especially AI technology, changes at near-breakneck speed, and often is incorporated into routine use by individuals, organizations, corporations and governments long before it is the subject of evidentiary scrutiny in a particular case. However, the Federal Rules of Evidence are resilient and are designed to be used in a manner that is flexible. Rule 102 provides: “These rules should be construed so as to administer every proceeding fairly, eliminating unjustifiable expense and delay, and *promote the development of evidence law*, to the end of ascertaining the truth and securing a just determination” (emphasis added).<sup>11</sup> Thus, we believe, the existing Federal Rules of Evidence are adequate for the task of evaluating AI evidence, provided they are applied flexibly.

Relevance and authenticity are the two areas that create most of the evidentiary challenges for admitting AI evidence, and they are the main focus of this subsection.<sup>12</sup> Other evidence

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<sup>10</sup> Every state in the United States has adopted its own rules of evidence, some of which are identical or nearly identical to the Federal Rules of Evidence, and some of which differ in significant respects. Nonetheless, the evidentiary concepts that govern admissibility of AI evidence are fundamental, and found in all compilations of the rules of evidence. Further, the Federal Rules of Evidence are frequently cited as persuasive authority even in states that have evidence codes that differ from the Federal Rules. For that reason, this section will focus on the Federal Rules of Evidence because of their national scope and their influence on state codifications of the rules of evidence. *See AI as Evidence* at 84 & n.333.

<sup>11</sup> Fed. R. Evid. 102.

<sup>12</sup> *See AI as Evidence* at 85.

doctrines, such as the hearsay rule,<sup>13</sup> and the original writing rule,<sup>14</sup> can be encountered, but these rules present less of a concern than authenticity. The focus of the hearsay rule is intentionally assertive statements made by human declarants,<sup>15</sup> and AI applications, by their very nature, involve machine-generated output.<sup>16</sup> While the evidence may, and often does, take the form of an express or implied factual assertion (e.g., “this is the photo of the person depicted in the surveillance video”; “this is the sector of the city that is likely to have the greatest potential for criminal activity on a particular day and time;” “this job applicant is likely to be the most qualified for the vacancy being filled”), and may be offered for its substantive truth, the source is not a *human* declarant, therefore it is not properly regarded as hearsay.<sup>17</sup> Rather, the key issue is *authenticity*—how accurately does the AI system that generated the evidence produce the result that its proponent claims it does. Similarly, the original writing rule imposes a requirement that proof of the content of writings, recordings and photographs must be made by introducing an original or duplicate original,<sup>18</sup> but those terms are defined interchangeably, and broadly, so they are seldom difficult to comply with, unless a witness is called who merely describes what he or she observed as the output of the AI system, instead of introducing a copy.<sup>19</sup> This seldom occurs for the simple reason that having a human describe the contents of the output of an AI system that produces a written, recorded, or photographic result robs it of most of the weight that the evidence would have if the jury were shown the output itself (once properly authenticated).<sup>20</sup>

## 2.1. Relevance

Federal Rule of Evidence 401 defines *relevance*. It states: “Evidence is relevant if: (a) it has any tendency to make a fact more or less probable than it would be without the evidence; and (b) the fact is of consequence in determining the action.” This is a relatively low bar for admitting evidence, because even evidence that has only a slight tendency to prove or disprove facts that

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<sup>13</sup> See Fed. R. Evid. 801-807.

<sup>14</sup> See Fed. R. Evid. 1001-1008.

<sup>15</sup> See Fed. R. Evid. 801(a)-(c).

<sup>16</sup> “Because human design, input, and operation are integral to a machine’s credibility, some courts and scholars have reasoned that a human is the true ‘declarant’ of any machine conveyance. But while a designer or operator might be partially epistemically or morally responsible for a machine’s statements, the human is not the sole source of the claim... . The machine is influenced by others, but is still a source whose credibility is at issue.” Andrea Roth, *Machine Testimony*, 127 Yale L.J. 1972, 1977-78 (2017). See also *AI as Evidence* at 85-86 & n.340.

<sup>17</sup> See, e.g., *U.S. v. Wallace*, 753 F.3d 671, 675 (7th Cir. 2014) (rejecting confrontation clause challenge to the admissibility of a video recording showing an exchange of drugs between two people because there was no human declarant to be cross examined and there was no showing that the conduct involved was intended by the participants to be an assertion, therefore, there was no hearsay “statement,” as contemplated by Fed. R. Evid. 801(a), and no “declarant,” as contemplated by Fed. R. Evid. 801(b); *U.S. v. Lizarraga-Tirado*, 789 F. 3d 1107, 1109-10 (9th Cir. 2015) (rejecting hearsay challenge to a satellite image and accompanying GPS coordinates).

<sup>18</sup> See Fed R. Evid. 1001 (defining duplicates and duplicate originals), 1002 (setting forth the substantive rule), and 1004-1007 (setting forth exceptions to the rule).

<sup>19</sup> See *AI as Evidence* at 86.

<sup>20</sup> See *id.*

are important to resolving a civil or criminal case can meet this standard.<sup>21</sup> Examined in isolation, it could be argued that AI evidence that has not adequately been examined to determine its validity and reliability still has some tendency to prove a disputed issue. Rule 401 does not require perfection, only a tendency to prove or disprove.<sup>22</sup>

Rule 401 must be considered along with Rules 402 and 403. Rule 402 states: “Relevant evidence is admissible unless any of the following provides otherwise: the United States Constitution; a federal statute; these rules [of evidence]; or other rules prescribed by the Supreme Court. Irrelevant evidence is not admissible.”<sup>23</sup> In essence, Rule 402 creates a presumption that relevant evidence is admissible, even if it is only minimally probative, unless other rules of evidence or sources of law require its exclusion.<sup>24</sup> While the first part of Rule 402 is flexible, the second part is immutable: irrelevant evidence is never admissible.<sup>25</sup>

Rule 403 provides: “The court may exclude relevant evidence if its probative value is substantially outweighed by a danger of one or more of the following: unfair prejudice, confusing the issues, misleading the jury, undue delay, wasting time or needlessly presenting cumulative evidence.”<sup>26</sup> As it relates to the admissibility of AI evidence, Rule 403 has three important features. First, it establishes a “balancing test” for determining whether relevant evidence may be considered by the judge or jury. This scale “tilts” towards admissibility of relevant evidence.<sup>27</sup> Such evidence is inadmissible only if its probative value (*i.e.*, its ability to prove or disprove important facts presented in a case) is *substantially outweighed* by the adverse consequences listed in the rule. It is not enough that relevant evidence will be prejudicial to the party against which it is introduced—after all, all evidence offered by a plaintiff or the government against a defendant is intended to be prejudicial in the sense that it is offered to show that the defendant is liable or guilty. It is excludable only if its prejudice is *unfair* to that party.<sup>28</sup> Similarly, Rule 403 will tolerate a degree of confusion on the part of the judge or jury that must evaluate the evidence, even if it might mislead them, provided that these adverse consequences do not substantially outweigh the tendency of the evidence to prove important facts in the case.<sup>29</sup> Even though the balancing in Rule 403 favors admissibility,

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<sup>21</sup> See *id.* at 86-87. See also Michael M. Martin, Stephen A. Salzborg, and Daniel Capra, 1 *Federal Rules of Evidence Manual* § 402.02[1], at 401-6-7 (12th ed. 2019) (“To be relevant it is enough that the evidence has a *tendency* to make a consequential fact even the least bit more probable or less probable than it would be without the evidence). (emphasis in original)).

<sup>22</sup> See *AI as Evidence* at 87.

<sup>23</sup> Fed. R. Evid. 402.

<sup>24</sup> See *AI as Evidence* at 87.

<sup>25</sup> See *id.*

<sup>26</sup> Fed. R. Evid. 403.

<sup>27</sup> See, e.g., *United States v. Terzado-Madruga*, 897 F.2d 1099, 1117 (11th Cir. 1990) (holding that the balancing test of Fed. R. Evid. 403 “should be struck in favor of admissibility.”).

<sup>28</sup> See *United States v. Guzman-Montanez*, 756 F.3d 1, 7 (1st Cir. 2014) (“[T]he law shields a defendant against unfair prejudice not against all prejudice. ‘[A]ll evidence is meant to be prejudicial; it is only unfair prejudice which must be avoided.’”). See also *AI as Evidence* at 87-88.

<sup>29</sup> See *id.* at 88.

the fact that the rule clearly establishes that judges must consider unfairness, must be aware that confusion may result, and must be careful to discern whether the jury may be misled, is extremely important, especially when applied to the admissibility of AI evidence.<sup>30</sup> After all, the court cannot evaluate technical evidence for prejudice, confusion, or assess whether it misleads without some understanding of how it works.<sup>31</sup> Similarly, judges cannot assess whether a jury will be misled or confused by AI evidence unless they have an appreciation for whether the AI application meets acceptable standards of validity and reliability, which may differ depending on what the evidence is being offered to prove, and the adverse consequences flowing from allowing a jury composed of lay persons to consider that evidence in reaching its verdict.<sup>32</sup>

Second, Rule 403 makes it clear that the trial judge acts as a gatekeeper, charged with the responsibility of reviewing the evidence, in the first instance, to determine whether the jury may hear it.<sup>33</sup> This obligation flows from another rule of evidence, such as Rule 104(a), which states: “The court must decide any preliminary question about whether a witness is qualified, a privilege exists, or evidence is admissible. In so deciding, the court is not bound by evidence rules, except those on privilege.”<sup>34</sup> Implicit in this delegation of responsibility to the court is the notion that the judge must have the tools to make this preliminary determination.<sup>35</sup> The hallmark feature of the American justice system is that it is an adversary process, and so it is the responsibility of the parties, not the judge, to develop and present the factual evidence that will be offered to the jury for its consideration.<sup>36</sup> Accordingly, lawyers who intend to offer (or challenge) AI evidence must do the work necessary to explain to the judge how the AI system works (including, for example, how it was programmed or trained, how it operates, and how it produced its output), why the evidence will enlighten not confuse and how it will promote a just outcome, not one that is unfair.<sup>37</sup>

Because of the technical complexity of AI evidence, the trial judge must raise with the parties, well in advance of the trial, the question of whether they intend to offer AI or similarly technical evidence at trial, and as part of the pretrial scheduling process, impose reasonable deadlines for disclosing an intention to introduce such evidence, and for challenging its admissibility, sufficiently far in advance of trial to allow the judge to have a hearing (which will likely require the testimony of expert witnesses).<sup>38</sup> Determinations about whether AI evidence meets adequate thresholds of validity and reliability sufficient for it to be considered by the jury do

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<sup>30</sup> *See id.*

<sup>31</sup> *See id.*

<sup>32</sup> *See id.*

<sup>33</sup> *See id.*

<sup>34</sup> *See id.*

<sup>35</sup> *See id.*

<sup>36</sup> *See id.*

<sup>37</sup> *See id.* at 89.

<sup>38</sup> *See id.*



not lend themselves to last minute, on-the-fly assessments, and should not be attempted or allowed in the middle of a trial itself.<sup>39</sup>

Finally, it should be obvious that a judge cannot make the determinations required by Rules 401 through 403 unless the party offering the AI evidence is prepared to disclose underlying information concerning, for example, the **training data** (if any) and the development and operation of the AI system sufficient to allow the opposing party (and the judge) to evaluate it, and the party against whom the AI evidence will be offered to decide whether and how to challenge it.<sup>40</sup> If a party intends to rely on output that is the product of an AI application in a civil or criminal trial, they should not be permitted to withhold from the party against whom that evidence will be offered the information necessary to determine the validity (i.e., the degree of accuracy with which the AI system measures what it purports to measure), and the reliability (i.e., the consistency with which the AI system correctly measures what it purports to measure under similar circumstances), of the AI evidence.<sup>41</sup> If they are prohibited from doing so by claims of proprietary information or trade secrets raised by the company that developed the AI application, the trial judge should consider giving the proponent of the AI evidence a choice: either disclose the underlying evidence (subject to an appropriate protective order), or otherwise demonstrate its validity and reliability.<sup>42</sup> If the proponent is unwilling or unable to do so, then serious consideration should be given as to whether they should be precluded from introducing the AI evidence at trial.<sup>43</sup>

In sum, invalid or unreliable AI systems produce results that have insufficient tendency to prove or disprove disputed facts in a trial and/or that are unduly prejudicial. Neither the trial judge nor the party against whom AI evidence is offered should be required to accept at face value the unproven claims of the proponent of the evidence that it is valid and reliable.<sup>44</sup>

## 2.2. Authentication of AI Evidence

Federal Rule of Evidence 901(a) sets forth, in plain terms, what is meant by the requirement that AI evidence must be *authenticated* in order to be considered by the jury. It states: “To satisfy the requirement of authenticating... an item of evidence, the proponent must produce evidence sufficient to support a finding that the item is what the proponent claims it is.”<sup>45</sup> Rule 901(b) then lists 10 non-exclusive ways in which a party can accomplish this task.<sup>46</sup> The examples that most readily lend themselves to authenticating AI evidence are: Rule 901(b)(1) (testimony of a witness with knowledge that an item is what it is claimed to be); and Rule

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<sup>39</sup> See *Id.*

<sup>40</sup> See *id.*

<sup>41</sup> See *id.*

<sup>42</sup> See *id.*

<sup>43</sup> See *id.*

<sup>44</sup> See *id.* at 90.

<sup>45</sup> Fed. R. Evid. 901(a). See also *AI as Evidence* at 90.

<sup>46</sup> See Fed. R. Evid. 901(b)(1)-(10). See also *AI as Evidence* at 90.

901(b)(9) (evidence describing a process or system and showing that it produces an accurate result).<sup>47</sup>

When authenticating AI evidence using Rule 901(b)(1), the testimony of the witness called to perform this task must comply with other rules of evidence.<sup>48</sup> For example, Rule 602 requires that the authenticating witness have personal knowledge of how the AI technology functions.<sup>49</sup> It states: “A witness may testify to a matter only if evidence is introduced sufficient to support a finding that the witness has personal knowledge of the matter. Evidence to prove personal knowledge may consist of the witness’s own testimony. This rule does not apply to a witness’s expert testimony under Rule 703.”<sup>50</sup>

There are some important features of Rule 602 that tend to be overlooked by some lawyers and judges.<sup>51</sup> There is an understandable tendency to call the fewest possible number of witnesses to authenticate evidence.<sup>52</sup> When a single person possesses all the knowledge needed to do so, then that is all that is required.<sup>53</sup> However, AI applications seldom are the product of a single person possessing personal knowledge of all the facts that are needed to demonstrate that the data used as input, the technology itself, and its output are what its proponent claims them to be. Data scientists may be required to describe the data used to train an AI system using machine learning.<sup>54</sup> Developers may be required to explain the features and weights that were chosen for the machine-learning algorithm.<sup>55</sup> Technicians knowledgeable about how to operate the AI system may be needed to explain what they did when they used the tool, and the results that they obtained.<sup>56</sup> These technicians, however, may not be able to explain how the data was collected or cleansed, how the machine-learning algorithm that underlies the system was trained, or how the system was tested to show that it produces valid

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<sup>47</sup> See *id.* at 91.

<sup>48</sup> See *id.*

<sup>49</sup> See Charles A. Wright and Victor J. Gold, 31 *Federal Practice and Procedure: Evidence* §7103, at 24-25 (2000), which states that “[f]or purposes of analyzing the scope of Rule 901, the most important additional relationship is the one between that provision and Rule 602... . Both Rules 602 and 901 identify elemental qualities that make evidence worthy of consideration. Since the provisions perform similar functions, it is important to know when evidence is subject to the personal knowledge requirement of Rule 602 and when it is subject to the authentication or identification requirement of Rule 901. Rule 602 applies only to testimonial evidence... . Rule 901 does not apply to testimonial evidence, it applies to all other evidence. The distinction can be misleading, however, because it might be taken to suggest that Rule 602 and 901 never apply to the same evidence. In fact, these provisions are simultaneously applied where testimony is the means by which some respect of non-testimonial evidence is relayed to the jury.” See also *AI as Evidence* at 91.

<sup>50</sup> Fed. R. Evid. 602.

<sup>51</sup> See *AI as Evidence* at 91.

<sup>52</sup> See *id.*

<sup>53</sup> See *id.*

<sup>54</sup> See *id.*

<sup>55</sup> See *id.*

<sup>56</sup> See *id.*

and reliable results.<sup>57</sup> Still other witnesses may be needed to interpret the output of the AI system.<sup>58</sup>

Rule 702 provides that: “A witness who is qualified as an expert by knowledge, skill, experience training or education may testify in the form of an opinion or otherwise if (a) the expert’s scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue; (b) the testimony is based on sufficient facts or data; (c) the testimony is the product of reliable principles and methods; and (d) the expert has reliably applied the principles and methods to the facts of the case.”<sup>59</sup>

Importantly, Rule 703 states that: “An expert may base an opinion on facts or data in the case that the expert has been made aware of or personally observed. If experts in the particular field would reasonably rely on those kinds of facts or data in forming an opinion on the subject, they need not be admissible for the opinion to be admitted.”<sup>60</sup> If the requirements of Rules 702 and 703 were met, then, a party that wanted to authenticate an AI system that was developed by a team of individuals with scientific, technical, or specialized knowledge beyond the personal knowledge of any one person could do so with a single qualified expert.<sup>61</sup> However, the requirements of Rules 702 and 703 are quite demanding when applied as intended by the Federal Rules of Evidence.<sup>62</sup>

In sum, lawyers must bear in mind, and judges must be vigilant to require, that the witness or witnesses called to authenticate AI evidence either have personal knowledge of the authenticating facts or qualify as an expert that is permitted to incorporate into their testimony information from sources beyond their own personal knowledge, provided it is sufficiently reliable.<sup>63</sup>

The second authenticating rule most suited to AI evidence is Rule 901(b)(9).<sup>64</sup> It permits authentication by “[e]vidence describing a process or system and showing that it produces an accurate result.”<sup>65</sup> To do so, the party that wishes to introduce the AI evidence would face the same challenges just described in the discussion of Rule 901(b)(1)—calling a single witness or

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<sup>57</sup> *See id.*

<sup>58</sup> *See id.*

<sup>59</sup> Fed. R. Evid. 702.

<sup>60</sup> Fed. R. Evid. 703. *See also AI as Evidence* at 93.

<sup>61</sup> *See id.*

<sup>62</sup> *See id.*

<sup>63</sup> *See, e.g.,* Fed. R. Evid. 703. *See also United States v. Frazier*, 387 F. 3d 1244, 1260 (11th Cir. 2004) (discussing the importance of a trial judge diligently fulfilling his or her gatekeeping function under Fed. R. Evid. 104(a) to ensure the “reliability and relevancy of expert testimony” because an expert’s opinion “can be both powerful and quite misleading because of the difficulty in evaluating it.”). *See also AI as Evidence* at 93.

<sup>64</sup> *See id.*

<sup>65</sup> Fed. R. Evid. 901(b)(9).

witnesses themselves possessing personal knowledge of all the authenticating facts, or qualifying as an expert under Rules 702 and 703.<sup>66</sup>

An important feature of authentication needs careful consideration in connection with admitting AI evidence.<sup>67</sup> Normally, a party has fulfilled its obligation to authenticate non-testimonial evidence by producing facts that are sufficient for a reasonable factfinder to conclude that the evidence more likely than not is what the proponent claims it is.<sup>68</sup> In other words, by a mere preponderance. This is a relatively low threshold—51%, or slightly better than a coin toss.<sup>69</sup> However, not all AI evidence is created equal.<sup>70</sup> Some AI systems have been independently tested and shown to be valid and reliable.<sup>71</sup> Others have not, when, for example, efforts to obtain information sufficient to test their validity and reliability have been blocked by claims of proprietary information or trade secret.<sup>72</sup> Moreover, some of the tasks for which AI applications have been put to use can have serious adverse consequences if they do not perform as promised—such as arresting and criminally charging a person based on flawed facial recognition technology, or sentencing a defendant to an extended term of imprisonment based on a machine-learning system that has been trained using biased or incomplete data that inaccurately or differentially predicts the likelihood that the individual will reoffend.<sup>73</sup>

The greater the risk of unacceptable adverse consequences, the greater the need to show that the AI system is unlikely to produce those consequences.<sup>74</sup> Judges, tasked with making the initial determination of admissibility of AI evidence under Rule 104(a), should be skeptical of

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<sup>66</sup> There are two additional rules of evidence that may be used to authenticate AI evidence that are closely related to Rules 901(b)(1) and 901(b)(9). They are Fed. R. Evid. 902(13), which allows authentication of “[a] record generated by an electronic process or system that produces an accurate result, as shown by a certification of a qualified person”; and Fed. R. Evid. 902(14), which allows authentication of “[d]ata copied from an electronic device, storage medium, or file, if authenticated by a process of digital identification, as shown by a certification of a qualified person.” Rules 902(13) and (14) would allow the proponent of AI evidence to authenticate it by substituting the certificate of a qualified witness for their live testimony. However, the qualifications of the certifying witness and the details of the certification that the evidence produces an accurate and reliable result must be the same as would be required by the in-court testimony of a similarly qualified witness. See Charles A. Wright and Victor J. Gold, *supra* n.49 §7147, at 43, stating that “[n]ewly adopted Rule 902(13)] allows the authenticity foundation that satisfies Rule 901(b)(9) [process or system producing accurate results] to be established by a certification rather than the testimony of a live witness. If the certification provides information that would be insufficient to authenticate the record if the certifying person testified, then authenticity is not established under Rule 902(13).” The same applies for the certification in Rule 902(14), certified data copied from an electronic device, storage medium, or file. See *AI as Evidence* at 93.

<sup>67</sup> See *id.* at 94.

<sup>68</sup> See *Lorraine v. Markel Am. Ins. Co.*, *supra* n.325 at 542; *United States v. Safavian*, 435 F. Supp. 2d. 28, 38 (D.D.C. 2006); *United States v. Holmquist*, 36 F. 3d 154, 168 (1st Cir. 1994) (“the standard for authentication, and hence admissibility, is one of reasonable likelihood.”). See also *AI as Evidence* at 94.

<sup>69</sup> See *id.*

<sup>70</sup> See *id.*

<sup>71</sup> See *id.*

<sup>72</sup> See *id.*

<sup>73</sup> See *id.*

<sup>74</sup> See *id.*

admitting AI evidence that has not been shown to be accurate by much more than an evidentiary coin toss.<sup>75</sup> They should insist that the proponent of the evidence establish the validity and reliability of the AI to a degree that is commensurate with the risk of the adverse consequences likely to occur if the technology does not perform as claimed.<sup>76</sup> If the proponent of the evidence fails to do so, then the trial judge should evaluate under Rule 403 whether the probative value of AI authenticated by a mere preponderance is substantially outweighed by the danger of unfair prejudice to the adverse party or would confuse or mislead the jury to an unacceptable degree,<sup>77</sup> taking into consideration the nature of the adverse consequences that could occur if the AI system is insufficiently valid or reliable.<sup>78</sup>

### 2.3. *Daubert* Factors and the Admissibility of Expert Evidence

Federal Rule of Evidence 702 requires that introduction of evidence dealing with scientific, technical, or specialized knowledge that is beyond the understanding of lay jurors be based on a sufficient facts or data and reliable methodology that has been applied reliably to the facts of the particular case.<sup>79</sup> These factors were added to the Federal Rules of Evidence in 2000 to bolster them in light of the U.S. Supreme Court’s decisions in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993), and *Kumho Tire Co. v. Carmichael*, 119 S. Ct. 1167 (1999).<sup>80</sup> Therefore, while Rule 702 was not intended to codify the *Daubert* decision, the factors discussed in that decision relating to determining the reliability of scientific or technical evidence are quite informative when determining whether Rule 702’s reliability requirement has been met.<sup>81</sup> As described in the Advisory Committee Note to the amendment of Rule 702 that went into effect in 2000, the “*Daubert* Factors” are: “(1) whether the expert’s technique or theory can be or has been tested...; (2) whether the technique or theory has been subject to peer review and publication; (3) the known or potential rate of error of the technique or theory when applied; (4) the existence and maintenance of standards and controls; and (5) whether the technique or theory has been generally accepted in the scientific [or technical] community.”<sup>82</sup> Most state courts have also adopted some version of the *Daubert* factors when considering the admissibility of scientific evidence.

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<sup>75</sup> See *id.*

<sup>76</sup> See *id.*

<sup>77</sup> See Fed. R. Evid. 403. See also *AI as Evidence* at 94-95.

<sup>78</sup> See *id.* at 95.

<sup>79</sup> See Fed. R. Evid. 702 (b)-(d). See also generally *In re Paoli R.R. Yard PCB Litig.*, 35 F. 3d 717, 742 (3d Cir. 1994) (discussing the importance of the reliability factor in the *Daubert* analysis, and the obligation of the trial judge to “take into account” all of the factors listed in *Daubert* that are relevant to determining the reliability of the scientific or technical evidence that is being offered into evidence). See also *AI as Evidence* at 95.

<sup>80</sup> See Advisory Committee Note, Fed. R. Evid. 702 (2000).

<sup>81</sup> See *AI as Evidence* at 95 & n.369. It should be noted that when the term “reliability” is used in the Federal Rules of Evidence and related case law, it encompasses both the scientific notions of validity (*i.e.*, accuracy) and reliability (*i.e.*, consistency under substantially similar circumstances).

<sup>82</sup> See Advisory Committee Note, Fed. R. Evid. 702 (2000).

Using the *Daubert* factors, in order to authenticate AI evidence, its proponent must show that it produces valid (meaning accurate) results.<sup>83</sup> It also must perform reliably, meaning that it consistently produces accurate results when applied in substantially similar circumstances.<sup>84</sup> When the validity and reliability of AI evidence has been verified through independent testing and evaluation of the AI system that produced it, the methodology used to develop the evidence has been published and subject to review by others in the same field of science or technology, when the error rate associated with the AI system is not unacceptably high, when standard methods and protocols for operation of the AI system have been followed, and when the methodology used is generally accepted within the field of similar scientists or technologists, then it has been authenticated.<sup>85</sup> It does what its proponents say it does.<sup>86</sup> And introducing evidence from such a system or application produces none of the adverse consequences against which Rule 403 is designed to guard.<sup>87</sup>

In contrast, when the validity and reliability of a system or process that produces AI evidence has not properly been tested, when its underlying methodology has been treated as a trade secret by its developer preventing it from being independently verified by others, when applying the method produces unacceptably high error rates, when corners were cut and standard procedures were not followed when the system was developed or employed, or when the methodology is not accepted as valid and reliable by others in the same field, then it is hard to say that it does what its proponent claims it does, which ought to render it inauthentic and inadmissible.<sup>88</sup> The bottom line is that if a lawyer intends to rely on AI evidence to prove their case, they should consider these five *Daubert* factors and marshal the facts to show compliance with as many of them as they can.<sup>89</sup> Courts should insist that the party offering evidence produced by an AI system to prove its case adequately show that it does what its proponent claims it does, to a degree of certainty commensurate with the risk of an unacceptably bad outcome if it turns out that the technology is unreliable.<sup>90</sup> Failing that, the AI evidence should be excluded for insufficiency of authentication (under Rule 901(a)), failure to show the use of reliable methodology that was applied to the facts of the case (under Rule 702), and/or excessive danger of unfair prejudice, or of confusing or misleading the jury (under Rule 403).<sup>91</sup>

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<sup>83</sup> See *AI as Evidence* at 96.

<sup>84</sup> See *id.*

<sup>85</sup> See *id.*

<sup>86</sup> See *id.*

<sup>87</sup> See *id.*

<sup>88</sup> See *id.*

<sup>89</sup> See *id.*

<sup>90</sup> See *id.*

<sup>91</sup> See *id.* at 96-97.

### 3. Conclusion

Although the adoption of AI within an increasingly large sector of society is a relatively recent development, it is undoubtedly here to stay.<sup>92</sup> AI is in a state of such rapid advancement that the law of evidence governing the circumstances under which AI systems and their output should be admitted into evidence in civil and criminal trials is not well developed.<sup>93</sup> Although some commentators have written about potential problems and concerns that impact whether AI evidence should be admitted, there are few court decisions that have squarely addressed the admissibility of AI evidence in proceedings governed by the Federal Rules of Evidence or their state-law equivalents.<sup>94</sup> This will change over time, as it is inevitable that AI systems and their inputs and outputs will be at the center of disputes that will increasingly find their way into court.<sup>95</sup> When this happens, lawyers and judges must be prepared to address the evidentiary issues that influence whether the AI evidence should be admitted.<sup>96</sup> Since AI systems are complex and highly technical, most lawyers and judges will be ill equipped for this task unless they have at least a rudimentary understanding of what AI is, how it operates, methods of scientific and statistical evaluation that impact decisions about its validity and reliability, and hence, its admissibility.<sup>97</sup> Because there are at present no rules in the Federal Rules of Evidence that directly address AI evidence, lawyers and judges must rely on the rules that do exist to provide an analytical framework to assist them when they confront these issues.<sup>98</sup>

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<sup>92</sup> *See id.* at 105.

<sup>93</sup> *See id.*

<sup>94</sup> *See id.*

<sup>95</sup> *See id.*

<sup>96</sup> *See id.*

<sup>97</sup> *See id.*

<sup>98</sup> *See id.*

## Annex A: Practice Pointers for Lawyers and Judges

If lawyers and judges accept the fact that there are myriad types and uses of AI, and that there are many potential challenges raised by AI—for example, potentially risk of bias, lack of robust testing and validation, function creep, lack of transparency and explainability, and lack of resilience—all of which can all affect the validity and reliability of AI evidence—and they recognize the need to authenticate AI evidence properly before it is admitted into evidence (following the rules that govern how to do so), then the question arises: How should lawyers faced with introducing or challenging AI evidence, and judges who must rule on its admissibility, go about doing so? Below, we offer some practical suggestions with the hope that they will make this task less daunting in practice.<sup>99</sup>

### A.1. What was the AI Designed to Address?

The essence of much AI technology, particularly that which relies on ML, comes down to:

1. the data used to train the system;
2. the algorithm(s) which comprise the system (including, but not limited to, their **features**, weights and operation); and
3. the models, predictions, or outputs that result from running the system.<sup>100</sup>

Algorithms are simply a set of rules or procedures for solving a problem or accomplishing an end.<sup>101</sup> So, the starting point for determining the admissibility of AI technology is to understand the problem that the AI was designed to solve.<sup>102</sup> Knowing this is essential to assessing:

1. the appropriateness of the data used to train the system, and whether it is representative of the data on which the system will be used;
2. the validity of the system (*i.e.*, its accuracy in performing the intended function);
3. its reliability (*i.e.*, the consistency with which it produces the same or substantially similar results when applied under substantially similar circumstances); and
4. whether it is being used for purposes for which it was not designed (*i.e.*, whether there has been substantial function creep).<sup>103</sup>

The proponent of the evidence should start with the AI's design objective in order to begin to amass the evidence necessary to secure its admissibility.<sup>104</sup> Opposing parties need to know this

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<sup>99</sup> See *AI as Evidence* at 97.

<sup>100</sup> See *id.*

<sup>101</sup> See *id.*

<sup>102</sup> See *id.*

<sup>103</sup> See *id.*

<sup>104</sup> See *id.*



information to be able to intelligently assess whether its admissibility should be challenged.<sup>105</sup> And judges need to know this to be able to rule on the admissibility of the evidence derived from the AI system.<sup>106</sup> Relevance is not an abstract concept. Evidence is relevant only to the extent that it has the ability to prove or disprove facts that are consequential to the resolution of a case. The problem that the AI was designed to address—and the output it produces—must “fit” with what is at issue in the litigation.<sup>107</sup> Without knowing what the AI was designed and programmed to do, none of these fundamental questions can begin to be answered.<sup>108</sup>

## A.2. How was the AI Developed and by Whom?

One of the issues that affects the validity and reliability of AI evidence is whether its design was influenced by improper bias, whether intended or not.<sup>109</sup> Was the data used to train the system skewed or complete?<sup>110</sup> Is it representative of the target population on which the system will be used?<sup>111</sup> If the AI system was trained with historical data that reflects discrimination, how was this addressed? Were variables incorporated that are proxies for impermissible characteristics (*e.g.*, zip code or arrest records, which may correlate with and therefore incorporate race)?<sup>112</sup> What assumptions, norms, rules, or values were used to develop the system? Were the people who did the programming themselves sufficiently qualified, experienced and/or diverse to ensure that there was not inadvertent bias that could impact the output of the system?<sup>113</sup> Did the programmers given due consideration to the population that will be affected by the performance of the system?<sup>114</sup> These questions cannot be answered without knowledge of certain factors, including information about the data that was used as input for purposes of training, how the AI system was developed and by whom, including the design choices that were made, how the system was operated and how the output was produced and interpreted.<sup>115</sup> Judges should be particularly careful not to allow a party planning to introduce AI evidence to hide behind claims of proprietary information or trade secrets without careful consideration of the consequence to the party against whom the AI evidence will be offered.<sup>116</sup> Will allowing trade-secret claims to shield disclosure of how the AI system was developed, trained and functions prevent the party against whom it will be introduced from having a fair opportunity to learn how the AI works (and where it may have defects) so

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<sup>105</sup> *See id.*

<sup>106</sup> *See id.*

<sup>107</sup> *See id.*

<sup>108</sup> *See id.*

<sup>109</sup> *See id.* at 98.

<sup>110</sup> *See id.*

<sup>111</sup> *See id.*

<sup>112</sup> *See id.*

<sup>113</sup> *See id.*

<sup>114</sup> *See id.*

<sup>115</sup> *See id.*

<sup>116</sup> *See id.*

that they can prepare a defense?<sup>117</sup> If so, how are they to frame evidentiary challenges to its use?<sup>118</sup> Adverse parties who are refused access to the information they need to assess AI's validity and reliability on the basis of claims of trade secrets should challenge these designations and seek a ruling from the court that either grants them access to the information they reasonably need (subject to proper protective measures) or prohibits the introduction of the AI evidence at trial.<sup>119</sup> Judges must ask themselves how they can fulfill their gatekeeping role in ruling on the admissibility of the AI evidence if presented with little more than a black-box AI program and a conclusory claim that it is accurate and consistently functions as it was designed to.<sup>120</sup>

### A.3. Were the Validity and Reliability of the AI Sufficiently Tested?

Validity and reliability are key concepts in assessing whether AI evidence should be admitted as evidence.<sup>121</sup> The proponent of AI evidence should be required to demonstrate that the AI system that produced the evidence being offered has been tested (preferably independently) to confirm that it is both valid for the purpose for which it is being offered, and reliable.<sup>122</sup> If it was not tested, why not, and on what basis is the proponent claiming that it operates as intended, and consistently so?<sup>123</sup> And why should the court even consider allowing the introduction of the output of an untested AI system?<sup>124</sup> Who designed and carried out the testing?<sup>125</sup> Was it the same people who developed the system in the first place?<sup>126</sup> If so, was the methodology used to test the system standard or otherwise reasonable, adhering to procedures accepted as appropriate by the relevant scientific or technical community familiar with the subject matter at the heart of the AI system?<sup>127</sup> Under what conditions did the testing occur and how do they compare to the circumstances under which the system is now being used?<sup>128</sup> Was the system tested for both validity and reliability?<sup>129</sup> Has the validity and reliability been confirmed by others who are independent of the developers?<sup>130</sup> Are the results of the testing still available so that they may be reviewed by the adverse party and the court?<sup>131</sup>

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<sup>117</sup> *See id.*

<sup>118</sup> *See id.*

<sup>119</sup> *See id.*

<sup>120</sup> *See id.*

<sup>121</sup> *See id.*

<sup>122</sup> *See id.* at 98-99.

<sup>123</sup> *See id.* at 99.

<sup>124</sup> *See id.*

<sup>125</sup> *See id.*

<sup>126</sup> *See id.*

<sup>127</sup> *See id.*

<sup>128</sup> *See id.*

<sup>129</sup> *See id.*

<sup>130</sup> *See id.*

<sup>131</sup> *See id.*

The answers to these questions should inform the court’s decision as to whether the evidence should be admitted at all.<sup>132</sup> Allowing the introduction of AI evidence derived from a system that has not been shown to be valid and reliable for the purpose for which the evidence is being introduced substantially increases the risk that its probative value (if any) is substantially outweighed by the danger of unfairly confusing or misleading the factfinder.<sup>133</sup> This is particularly the case if the AI evidence is the primary evidence being offered to prove an essential element of the proponent’s case.<sup>134</sup>

#### A.4. Is the Manner in Which the AI Operates “Explainable” So that It Can be Understood by Counsel, the Court and the Jury?

An important factor in evaluating the admissibility of AI evidence is whether the functioning of the AI system that produced the evidence can be explained to the trier of fact, who may be unfamiliar with the technology and methodology involved, so they can understand, at least at a general level, how the system operates, how it achieves its results, and thus, evaluate the amount of weight they are willing to give to the evidence derived from it.<sup>135</sup> NIST offers useful guidance in this regard in its publication titled *Four Principles of Explainable Artificial Intelligence*.<sup>136</sup> The NIST authors describe four principles of explainable AI:

- **Explanation:** Systems deliver accompanying evidence or reason(s) for all outputs.
- **Meaningful:** Systems provide explanations that are understandable to individual users.
- **Explanation Accuracy:** The explanation correctly reflects the system’s process for generating the output; and
- **Knowledge Limits:** The system only operates under conditions for which it was designed or when the system reaches a sufficient confidence in its output.<sup>137</sup>

Although written from the perspective of scientists interested in the development and/or evaluation of valid and reliable AI methods, the discussion emphasizes the same themes that underlie the purpose of the rules of evidence: that when technical information is offered during a trial, the proponent of that evidence must demonstrate that it is sufficiently trustworthy for the trier of fact to credit it in making its decision.<sup>138</sup> If the proponent of the evidence cannot even explain how the AI system operates in a way that can be understood by the trier of fact (including assuring them that it is only being used under the conditions for which it was designed, describing the system’s error rate, and showing that there is acceptable confidence in

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<sup>132</sup> *See id.*

<sup>133</sup> *See id.*

<sup>134</sup> *See id.*

<sup>135</sup> *See id.*

<sup>136</sup> *See* P. Jonathon Phillips et al., *Four Principles of Explainable Artificial Intelligence*, NIST Pub. NISTIR 8312 (Sept. 2021).

<sup>137</sup> *Id.* at ii. *See also AI as Evidence* at 99-100.

<sup>138</sup> *See id.* at 100.

its accuracy), that can affect whether the evidence produced from the system should be admitted by the court.<sup>139</sup>

### A.5. What is the Risk of Harm if AI Evidence that is Not Shown to be Trustworthy is Admitted?

The Federal Rules of Evidence do not require that all risk of error be eliminated before scientific and technical evidence may be admitted.<sup>140</sup> Evidence is relevant if it has any tendency, however slight, to prove or disprove facts that are important to deciding a case.<sup>141</sup> And authenticity is established if the proponent demonstrates that the evidence more likely than not is what it purports to be.<sup>142</sup> The argument could be made that even AI evidence shown to be valid and reliable for a particular purpose, but which is being offered to prove something for which its validity and reliability have not been established, may have some tendency to prove what it is being offered to prove.<sup>143</sup>

The expert witness rules<sup>144</sup> are helpful for evaluating the admissibility of AI evidence because they supply demanding standards:

1. whether there is a sufficient factual basis to support the evidence;
2. whether the methods and principles used to generate the evidence were reliable; and
3. whether they were reliably applied to the facts of the particular case.<sup>145</sup>

The *Daubert* factors further focus the inquiry on the following:

1. whether the methodology was tested;
2. whether there is a known error rate;
3. whether the methods used are generally accepted as reliable within the relevant scientific or technical community that is familiar with the methodology;
4. whether the methodology has been subject to peer review by others knowledgeable in the field; and
5. whether standard procedures or protocols are applicable to the methodology, and if they were complied with.<sup>146</sup>

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<sup>139</sup> See *id.*

<sup>140</sup> See *id.* at 101.

<sup>141</sup> See Fed. R. Evid. 402. See also *AI as Evidence* at 101.

<sup>142</sup> See *id.*

<sup>143</sup> See *id.*

<sup>144</sup> See Fed. R. Evid. 702; 703.

<sup>145</sup> See Fed. R. Evid. 702. See also *AI as Evidence* at 101.

<sup>146</sup> See *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 593-94 (1993). See also *AI as Evidence* at 101.

But even this enhanced level of analysis does not require perfection.<sup>147</sup> The ultimate question that must be decided in each case is *whether the evidence is sufficiently valid and reliable for the purpose for which it is being offered*. The answer to this question will depend on what is at stake if the fact finder credits AI evidence that is invalid and unreliable.<sup>148</sup>

## A.6. Timing Issues

Determining whether AI evidence should be admitted at trial is complicated, requires a great deal of information and is not the type of issue that is well suited to being resolved in the middle of a trial, or on the fly.<sup>149</sup> Preparation is critical, both by the proponent and opponent of the AI evidence.<sup>150</sup> The judge needs time to hear the competing evidence, to carefully review the supporting materials and to decide.<sup>151</sup> But since there is no rule of evidence that specifically addresses AI evidence, nor do the Federal Rules of Civil or Criminal Procedure directly require the disclosure of AI evidence, there is a risk that it may not be disclosed soon enough for disputes about its admissibility to be determined before trial.<sup>152</sup>

It is true that a party that intends to call a witness who would meet the definition of an expert witness under Fed. R. Evid. 702, in order to lay the foundation for AI evidence, would have to disclose the witnesses' opinions and the basis therefore, which should give its adversary and the court some advanced notice that AI evidence is going to be introduced.<sup>153</sup> But expert disclosures often are more generally about the subjects of the expert's intended testimony than the rules actually require, such that the intent to introduce AI evidence may not be clearly flagged far enough ahead of trial.<sup>154</sup> That means that the parties should communicate well ahead of trial to determine whether AI evidence is going to be offered at trial, and reach agreement (or bring the matter to the attention of the court) about when such AI evidence will be disclosed, the extent to which the party against whom the AI evidence will be proffered will have access to the information needed to assess and challenge its validity and reliability, and whether the proponent of the AI evidence will assert proprietary information or trade-secret protection to deny the production of such information to the opposing party.<sup>155</sup>

The trial judge should also inquire during the pretrial stage of the case whether AI evidence will be introduced, set a deadline for its production, as well as for challenges to its admissibility, rule on any trade-secret claims and schedule a hearing well before trial to ensure that the court itself is adequately informed and has sufficient time to make a principled decision as far in

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<sup>147</sup> *See id.*

<sup>148</sup> *See id.*

<sup>149</sup> *See id.*

<sup>150</sup> *See id.* at 104.

<sup>151</sup> *See id.*

<sup>152</sup> *See id.*

<sup>153</sup> *See* Fed. R. Civ. P. 26(b)(4); Fed. R. Cr. P. 16(a)(1)(G). *See also AI as Evidence* at 104.

<sup>154</sup> *See id.*

<sup>155</sup> *See id.* at 105.

advance of trial as possible.<sup>156</sup> Finally, a trial judge faced with ruling on the admissibility of AI evidence need not rely solely on the arguments of the attorneys for the parties and their experts but can appoint a court expert as permitted by Fed. R. Evid. 706,<sup>157</sup> if the circumstances so warrant.<sup>158</sup>

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<sup>156</sup> *See id.*

<sup>157</sup> *See* Fed. R. Evid. 706. *See also* *AI as Evidence* at 105.

<sup>158</sup> *See id.*

## Annex B: Hypothetical on the Admissibility of Facial Recognition Testimony in a Criminal Matter

### B.1. Factual Background

Defendant Jamal Warner has been charged with armed robbery, assault and brandishing a firearm in the Meridian County Circuit Court, State of South Sunland. Since his arrest in October, 2021, he has been held in pretrial detention. He is represented by an attorney in the South Sunland Public Defender's Office. An Assistant District Attorney for Meridian County is the prosecutor.

The indictment alleges that on August 21, 2021, at 8:45 PM, Warner, wearing a hoodie with the hood pulled up and sunglasses, entered the Deluxe Jewelry Store shortly before closing time. He produced a handgun, and ordered the only employee present, Bob Parker, the store manager, to put all of the cash in the register and in the store safe into a gym bag, along with all the high-end jewelry. Warner brandished the firearm as he demanded the cash and jewelry, threatened to shoot Parker, and when Parker dropped some jewelry on the counter, Warner hit him on the side of his head with the firearm. Warner then grabbed the gym bag and fled the store. The scene was captured on the store's surveillance video, which is grainy and slightly out of focus. While it is possible to see the robber's actions, his facial features are partially obscured by his hoodie and the sunglasses, and the angle at which the camera is pointing makes it difficult to determine Warner's height. It can be determined, however, that he is a dark-skinned African American male, with a close-cropped beard, who appears to be of thin build. Parker, the store manager, is a 57-year-old white male.

Meridian County police officers responded to the scene minutes after Warner fled the store, alerted by the alarm that went off when activated by Parker as Warner was fleeing. They obtained a copy of the surveillance video, which was given to Investigator Mary Adams, a digital forensic examiner, who viewed it. Adams, who also is white, selected three still frames from the video that showed three-quarters of Warner's partially turned head more clearly than any other frames of the video. She then loaded these three images into a forensic facial recognition software program that the Meridian Police have licensed from its manufacturer, Accu-Match. Then, using the Accu-Match program, she accessed the South Sunland State Central Criminal Records Database, she scanned the booking photographs of all Black males in that database. All of these photos are face-on photos, taken under good lighting conditions. The Accu-Match software uses an AI algorithm to compare exemplar digital images to a survey set of digital images contained in the database being surveyed. Adams followed the steps she learned when she was trained how to use the Accu-Match software to run the three images taken from the surveillance video against the booking photographs in the Central Criminal Records database. This search resulted in 52 "matches" that were produced in the following categories: highly probable match (15 photos), probable match (17 photos) and possible match (20 photos).

Adams selected five photos from the “highly probable match” photos that Adams thought most closely resembled the images in the jewelry store video. All five were African American males with beards. She arranged these five photos in a photo-array, showed them to Parker, who studied them carefully before saying “It’s hard to tell, because the robber was wearing dark glasses and a hoodie, but I’m pretty sure it was photo number three.” Photo number three was a booking photo of Warner taken in May 2015, when he was arrested for drunk and disorderly conduct. On the basis of that identification, Adams obtained an arrest warrant, and Warner was arrested, charged with robbery, assault and brandishing a firearm, and detained while awaiting trial.

Warner’s Public Defender has filed a motion to suppress the pretrial identification of Warner. An evidentiary hearing on this motion has been scheduled by Circuit Court Judge Gail Langley. Under the South Sunland Rules of Criminal Procedure, the rules of evidence govern pretrial suppression motions in criminal cases. The South Sunland Rules of Evidence are identical to the Federal Rules of Evidence. Prior to the motion’s hearing Warner’s attorney requested the issuance of a subpoena to the Accu-Match Company to compel them to produce the Accu-Match software and its source code, so that a digital forensic examiner hired by counsel for Warner can examine and test it, to determine how it functions and its accuracy. The prosecutor objected to the issuance of the subpoena, and counsel for Accu-Match filed a motion to quash the subpoena. They both argued that the source code of the Accu-Match was proprietary, confidential trade-secret information that should not be produced in discovery. However, the prosecutor proffered to Judge Langley that it would authenticate the Accu-Match software with an appropriate witness that would establish its accuracy. Judge Langley granted the motion to quash, and declined to issue the subpoena.

Thirty days before the evidentiary hearing the prosecutor filed with the court and served on the Defendant a Certification signed under penalty of perjury by Investigator Adams, attached to which were copies of the three images of the robber taken from the jewelry store surveillance video, and the five Central Criminal Records images that were selected from among the “highly probable match” set produced by the Accu-Match AI. The Certification was made pursuant to South Sunland Evidence Rule 902(13), which permits the authentication of records generated by an electronic system or process shown to produce accurate results. In the Declaration, Adams stated that she had been a police officer in the Meridian County Police Department for 17 years, five years as a patrol officer, seven years as a detective in the violent crimes division and five years as a digital forensic examiner. With respect to her qualifications as a digital forensic examiner, Adams’ declaration stated that she had attended a nine-month forensic examiner training course at the South Sunland Law Enforcement Academy (where she learned how to extract digital information from digital devices, desktop computers, laptops, tablets and smart phones), followed by two years as an assistant forensic examiner, during which time she worked along with a senior forensic examiner on actual cases, and received further on-the-job-training in forensic examination. Two years earlier she was selected to attend a three-month training course sponsored by Accu-Match, where she was trained in how to operate its AI



software to perform facial recognition examinations comparing exemplar digital facial images to a comparison set of digital images. At the conclusion of that training, she was certified as a Accu-Match examiner by the company. She outlined the step-by-step procedures required when using the Accu-Match software, and confirmed that she followed each step as trained to do. In addition, she stated that she had been using this software for more than 18 months in dozens of criminal investigations, and that in each case, the software produced highly probable matches that resulted in arrests and in many of those cases criminal charges had been issued. Finally, she stated that in each case in which she used the Accu-Match software, her selection results were peer-reviewed by another certified digital forensic examiner in her office who also was a certified Accu-Match examiner. Finally, she stated that she had testified in three trials as to her use of this software in making a facial recognition match, had been qualified as an expert in each instance, and the evidence of her selections was admitted into evidence at trial, where the defendant was convicted.

## B.2. Framework for Legal Issues Regarding the Admissibility of the Accu-Match Facial Recognition Software

### B.2.(a). *Relevance Rules of Evidence*

- **Federal Rule of Evidence 401**: “Evidence is relevant if: (a) it has any tendency to make a fact more or less probable than it would be without the evidence; and (b) the fact is of consequence in determining the action.” This is a relatively low bar to admitting evidence.
- **Federal Rule of Evidence 402**: “Relevant evidence is admissible unless any of the following provides otherwise: the United States Constitution; a federal statute; these rules [of evidence]; or other rules prescribed by the Supreme Court. Irrelevant evidence is not admissible.” In essence, Rule 402 creates a presumption that relevant evidence is admissible, even if it is only minimally probative, unless other rules of evidence or sources of law require its exclusion.
- **Federal Rule of Evidence 403**: “The court may exclude relevant evidence if its probative value is substantially outweighed by a danger of one or more of the following: unfair prejudice, confusing the issues, misleading the jury, undue delay, wasting time or needlessly presenting cumulative evidence.” As it relates to the admissibility of AI evidence, Rule 403 establishes a “balancing test” for determining whether relevant evidence may be considered by the judge or jury. It is inadmissible only if its probative value (*i.e.*, its ability to prove or disprove important facts presented in a case) is substantially outweighed by the adverse consequences listed in the rule. Similarly, Rule 403 will tolerate a degree of confusion on the part of the judge or jury that must evaluate the evidence, even if it might mislead them, provided that these adverse consequences do not substantially outweigh the tendency of the evidence to prove important facts in the case. Even though the balancing in Rule 403 favors admissibility, the fact that the rule clearly establishes that judges must consider unfairness, be aware

that confusion may result, and be careful to discern whether the jury may be misled, is extremely important, especially when applied to the admissibility of AI evidence. Similarly, judges cannot assess whether a jury will be misled or confused by AI evidence unless they have an appreciation for whether the AI application meets acceptable standards of validity and reliability, which may differ depending on what the evidence is being offered to prove, and the adverse consequences flowing from allowing a jury composed of lay persons to consider that evidence in reaching its verdict.

- **Federal Rule of Evidence 104(a):** “The court must decide any preliminary question about whether a witness is qualified, a privilege exists, or evidence is admissible. In so deciding, the court is not bound by evidence rules, except those on privilege.” Lawyers who intend to offer (or challenge) AI evidence must do the work necessary to explain to the judge how the AI system works (i.e., produced its output), why the evidence will enlighten not confuse, and promote a just outcome, not one that is unfair.

### *B.2.(b). Authenticity Rules of Evidence*

- **Federal Rule of Evidence 901(a):** “To satisfy the requirement of authenticating ... an item of evidence, the proponent must produce evidence sufficient to support a finding that the item is what the proponent claims it is.” Rule 901(b) lists 10 non-exclusive ways in which a party can accomplish this task. The examples that most readily lend themselves to authenticating AI evidence are: Rule 901(b)(1) (testimony of a witness with knowledge that an item is what it is claimed to be); and Rule 901(b)(9) (evidence describing a process or system and showing that it produces an accurate result).
- **Federal Rule of Evidence 901(b)(9):** It permits authentication by “[e]vidence describing a process or system and showing that it produces an accurate result.” To do so, the party that wishes to introduce the AI evidence can call a single person or persons themselves possessing personal knowledge of all the authenticating facts or qualifying as an expert under Rules 702 and 703.
- **Federal Rule of Evidence 902(13):** This rule allows for self-authentication of “[a] record generated by an electronic process or system that produces an accurate result, as shown by a certificate of a qualified person that complies with the certification requirements of Rule 902(11) or (12). The proponent must also meet the notice requirement of Rule 902(11).

### *B.2.(c). Witnesses*

- **Federal Rule of Evidence 602:** “A witness may testify to a matter only if evidence is introduced sufficient to support a finding that the witness has personal knowledge of the matter. Evidence to prove personal knowledge may consist of the witness’s own testimony. This rule does not apply to a witness’s expert testimony under Rule 703.

### B.2.(d). Rule 702 and the 'Daubert Factors' Regarding the Admissibility of Expert Testimony

- **Federal Rule of Evidence 702:** “A witness who is qualified as an expert by knowledge, skill, experience, training, or education may testify in the form of an opinion or otherwise if:
  1. the expert’s scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue;
  2. the testimony is based on sufficient facts or data;
  3. the testimony is the product of reliable principles and methods; and
  4. the expert has reliably applied the principles and methods to the facts of the case.”
  
- **'Daubert Factors':** The factors discussed in the U.S. Supreme Court’s decisions in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993), and *Kumho Tire Co. v. Carmichael*, 119 S. Ct. 1167 (1999) relating to determining the reliability of scientific or technical evidence are informative when determining whether Rule 702’s reliability requirement has been met. As described in the Advisory Committee Note to the amendment of Rule 702 that went into effect in 2000, the “*Daubert Factors*” are:
  1. “whether the expert’s technique or theory can be or has been tested...;
  2. whether the technique or theory has been subject to peer review and publication;
  3. the known or potential rate of error of the technique or theory when applied;
  4. the existence and maintenance of standards and controls; and
  5. whether the technique or theory has been generally accepted in the scientific [or technical] community.”<sup>159</sup>

### B.3. Specific Factual Considerations with Respect to the Admissibility of the Accu-Match Facial Recognition Software

Factors relating to the reliability and quality of probe photos from the Deluxe Jewelry Store video:

- Resolution;
- Lighting;
- Distance of the suspect from the camera;
- Orientation of probe photo (*i.e.*, facial angle);
- Occlusion of face with mask, glasses, facial hair, hoodie or hat etc.;
- Facial expression of suspect;

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<sup>159</sup> See Advisory Committee Note, Fed. R. Evid. 702 (2000).

- Demographics for suspect (*e.g.*, race, gender, age);
- Any editing of probe photos;
- Number of probe photos that were not used with software and reason for excluding those photos.

Factors relating to photo database:

- Origin of photos, including how they were selected and by whom;
- Age of photos;
- Resolution;
- Lighting;
- Any editing of photos;
- Number of photos in database of individuals with similar characteristics to suspect in terms of:
  - Distance of the suspect from the camera;
  - Orientation of probe photo (*i.e.*, facial angle);
  - Occlusion of face with mask, glasses, facial hair etc.;
  - Facial expression of suspect;
  - Demographics for suspect (*i.e.*, race, gender, age).

Factors relating to Accu-Match software:

- Known error rate or bias (*i.e.*, training data was not sufficiently representative of exemplars similar in demographics to Defendant Warner or algorithm has higher error rate with certain demographics);
- Validation studies, including with regard to individuals with a similar demographic background to Defendant Warner and whether those studies were conducted independently or by Accu-Match itself;
- Proficiency tests;
- Software updates;
- Peer-reviewed literature relating to this or similar software;
- Industry standards or controls;
- General acceptance of this specific type of technology and the particular algorithm used in the scientific community;
- Ability to test software, including using source code.

Factors relating to Investigator Adams' testimony:

- Knowledge, skills, training and education regarding facial recognition software generally, and Accu-Match software specifically (in other words, does she have the specialized knowledge or skill to testify to the validity and reliability of the software itself, or is her knowledge limited to her training and experience regarding how to use the software, in

which case she would not be qualified to provide the certification under Rule 902(13) establishing that the product of using the software was the result of a system or process that produced an accurate result);

- Specific procedures used in this matter to make the match with Defendant Warner;
- Demographic considerations, including similarity with Defendant Warner and examiner’s potential biases;
- Specific experience of the digital forensic examiner peer-reviewer with Accu-Match software, and demographics regarding peer-reviewer, including potential biases;
- Consideration of the demographics of Bob Parker, the store manager, and potential biases.

#### B.4. Final Thoughts

1. In deciding the admissibility of the evidence of the Accu-Match identification, the presiding judge must first determine whether it has been properly authenticated by Investigator Adams. Although she provided a certificate to authenticate the fact that the results produced by Accu-Match were the result of a system or process that produces accurate results (*i.e.*, the standard articulated by Rules 901(b)(9) and 902(13), does Adams have the training, knowledge and experience to testify either from personal knowledge or expertise as to how the software was developed, trained and tested (all of which require expertise), or is she merely relaying conclusory statements told to her when she was trained on how to use the software? In other words, is she the correct person to authenticate this evidence?
2. The trial judge must resolve the issue of whether the defense attorney should be given access to source code or other information about how the Accu-Match system operates, to be able to independently test it to have a basis to challenge its accuracy. While this information may be a trade secret or confidential proprietary information of Accu-Match, that does not render it immune from discovery, and an outright prohibition of discovery to confirm the software’s accuracy may raise due process issues. A better approach is to allow reasonable discovery by the defense, subject to a protective order.
3. Finally, after considering all the evidence in favor of and against admitting the Accu-Match photo match, is the judge satisfied that the software is sufficiently valid and reliable (*i.e.*, the result of a system or process that produces accurate results) to outweigh the danger of unfair prejudice that would result from an identification that is based on insufficiently accurate evidence? The judge would not only consider the identification match generated by Accu-Match, but also the strength of Parker’s identification, the actual security video, the three images selected by Investigator Adams to use with Accu-Match, the selections made by Accu-Match, the selection of the five photos from the 52 Accu-Match “matches,” and whether the Defendant’s attorney has had a fair opportunity to receive discovery sufficient to challenge the accuracy of the Accu-Match software.

## Annex C: Hypothetical on Measuring a Machine Learning System’s Accuracy and Reliability—Problem Gambling

### C.1. Forward

For judges who must decide whether to admit evidence, it is important to determine the accuracy and reliability of an AI system under inspection. The following example illustrates some of the challenges in doing this. It is adapted from the author’s recent experience as an expert witness in a case in Australia, and has been modified to protect identities.

### C.2. Fact Pattern

As a responsible corporation, the Emerald Casino contracted Daedalus Research to build a Machine Learning (ML) system to identify problem gamblers on their slot machines. The system was to take various inputs such as bet size, bet timing and bet frequency, as well as personal information extracted from video cameras such as gender and estimated age. The ML system was then required to classify a person using a slot machine into one of two classes: problem or non-problem gambler.

Daedalus Research built a system to perform this classification and delivered it to the Emerald Casino. However, the matter ended up in the courts when the Emerald Casino refused to pay for the system, disputing the claims of Daedalus Research that their system was accurate and reliable. Emerald Casino argued that the predictions were poor—half the people it classified as problem gamblers were not. Daedalus Research defended the system vigorously, arguing that their tests had shown it was 90% accurate and only 1-in-10 predictions were incorrect.

As is common practice in the ML community, Daedalus Research divided their data of 1000 people into training and test sets. Their algorithm was trained on the training set of 800 people, 400 problem and 400 non-problem gamblers.<sup>160</sup> It was then tested on the (up to then unseen) test set of 100 problem and 100 non-problem gamblers. It is common practice in the Machine Learning community for such an 80/20 split of training/test data. Daedalus Research reported 90% accuracy on this test set. That is, 180 of the 200 people in the test set were correctly identified as problem or non-problem gamblers, and just 20 of the 200 people in the test set were mis-classified.

The expert witness for the Emerald Casino pointed out the problem of considering just a simple summary statistic like accuracy and of the fact that in practice the problem is unbalanced — problem gamblers are typically in a minority compared to non-problem gamblers. Only around

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<sup>160</sup> We suppose, in this hypothetical, that there is a reliable method to identify problem and non-problem gamblers that this machine learning system is trying to replicate. If the training data is not reliably labelled, then we are in the unfortunate position of “Garbage In, Garbage Out.”

10% of the gambling population experience issues with their gambling. Thus, in a sample of 200 people, you might expect only about 20 problem gamblers, and not 100 as in the test set used by Daedalus Research. The expert witness for the Emerald Casino went on to note that a Machine Learning system that simply classified everyone as a non-problem gambler would achieve 90% accuracy but this is clearly not very useful.

Daedalus Research responded to these concerns by submitting a “confusion matrix” where the classification errors are broken out into false positives and false negatives (also called **type one** and **type two errors**), as well as true positives and true negatives. This data demonstrated that on the test set, the classifier was equally likely to give false positives as false negatives. That is, for the 20 people mis-classified, 10 people who were problem gamblers were classified as non-problem gamblers, and 10 people who were non-problem gamblers were classified as problem gamblers.

The system was thus 90% accurate at identifying non-problem gamblers correctly, and 90% accurate at identifying problem gamblers correctly. We can therefore estimate its accuracy on a representative sample of 200 people, 180 who are non-problem gamblers and 20 who are problem gamblers. 162 of these 180 non-problem gamblers ( $0.9 \times 180$ ) will be correctly classified as non-problem gamblers. And 18 of the 20 problem gamblers ( $0.9 \times 20$ ) will be correctly classified as problem gamblers. But 18 of the 180 ( $=180-162$ ) non-problem gamblers will be incorrectly classified as problem gamblers. In total, 36 people ( $=18+18$ ) people will be classified as problem gamblers, but 18 out of these 36 people classified as a problem gambler will not, in fact, be problem gamblers.<sup>161</sup> That is, as the Emerald Casino had claimed, half of the people classified by the classifier as a problem gambler were not problem gamblers.

A further concern raised by the expert witness from the Emerald Casino is “distributional shift.” This is a change in the data distribution between an algorithm's training data, and the actual data encountered when deployed.<sup>162</sup> In this case, the training data was collected from the Emerald Casino in Hobart, Tasmania where, due to COVID restrictions, there are very few overseas visitors. However, when the system was applied to the Emerald Casino in Sydney, the data was very different due to the lifting of border restrictions and the presence of many more overseas visitors. Indeed, close analysis of the Hobart test set identified that, there, the classifier almost never identified overseas visitors as problem gamblers. As there were so few overseas visitors (in Hobart) in the training or test set, this had little impact on accuracy on the test set. By contrast, in the Sydney casino, half of all gamblers are from overseas, further degrading the accuracy and reliability of the classifier. It is not possible to quantify the amount

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<sup>161</sup> For clarity: 36 is the total of people classified as problem gamblers; 18 are, in fact, problem gamblers and 18 are non-problem gamblers mis-classified.

<sup>162</sup> Put another way, a distributional shift is a change in the data distribution between an algorithm's training dataset, and a dataset it encounters when deployed (i.e., in the real world, a.k.a. the “wild”). Such shifts are common in practical applications of artificial intelligence.

by which performance degraded without data breaking down performance on overseas/non-overseas gamblers.

### C.3. Conclusion / Sample Questions for Courts:

In considering the accuracy and reliability of an AI system, there are a range of issues that need to be considered. The following are sample questions courts may consider:

1. Was the dataset on which it was trained representative of the domain to which it was applied?
  - For instance, are the different classes (i.e., problem/non-problem gambler) balanced? How will this impact performance?
2. Are we trying to classify some rare event?
  - If so, we may need to consider performance very differently to events that are common.
3. Was the dataset “cleaned”?
  - Often, you will need to check for missing entries, erroneous data points and other anomalies in the data.
4. Did the data include all important features?
  - For instance, if gambling behavior of overseas visitors is very different to non-overseas visitors then this ought, probably, to be an input feature.
5. Was good practice used in training the system?
  - For example, was the data set separated into training and test set?
  - Was the data split between training and test set in a standard way (i.e. 80/20, 67/33, 50/50)?
6. Was performance analyzed carefully?
  - For example, were the different types of errors broken out? Perhaps the only errors are false positives and false positives are much more costly to fix than false negatives.
7. Was the model fixed or was it updated over time?
  - Once a model is deployed, you can expect distributional shift. It may be good practice to re-train the model at regular intervals to deal with such shift.



# TAB 2

# TAB 2A

## **Advisory Committee on Evidence Rules**

Minutes of the Meeting of October 27, 2023

University of St. Thomas, School of Law

Minneapolis, Minnesota

The Judicial Conference Advisory Committee on the Federal Rules of Evidence (the “Committee”) met on October 27, 2023 at the University of St. Thomas School of Law in Minneapolis, Minnesota.

*The following members of the Committee were present:*

Hon. Patrick J. Schiltz, Chair

Hon. Valerie E. Caproni

Hon. Mark S. Massa

Hon. Edmund A. Sargus, Jr.

Hon. Richard J. Sullivan

James P. Cooney III, Esq.

John S. Siffert, Esq.

Rene Valladares, Esq., Federal Public Defender

Elizabeth J. Shapiro, Esq., Department of Justice

*Also present were:*

Hon. John D. Bates, Chair of the Committee on Rules of Practice and Procedure

Professor Catherine T. Struve, Reporter to the Standing Committee

Hon. Edward M. Mansfield, Liaison from the Standing Committee

Professor Daniel J. Capra, Reporter to the Committee

Professor Liesa L. Richter, Academic Consultant to the Committee

Timothy L. Lau, Esq., Federal Judicial Center

Bridget M. Healy, Esq., Administrative Office of the U.S. Courts

Allison A. Bruff, Esq., Administrative Office of the U.S. Courts

Zachary Hawari, Esq., Rules Clerk

Professor Paul W. Grimm

Professor Maura R. Grossman

Professor Jeffrey Bellin

Professor Hillel J. Bavli

Professor Erin E. Murphy

Susan Steinman, Esq., American Association for Justice

*Present Via Microsoft Teams*

Professor Daniel R. Coquillette, Consultant to the Standing Committee

Hon. M. Hannah Lauck, Liaison from the Civil Rules Committee

Professor Edward J. Imwinkelried

Professor Andrea Roth

Shelly Cox, Management Analyst, Administrative Office of the U.S. Courts

John G. McCarthy, Esq., Smith Gambrell & Russel LLP

John Hawkinson, Journalist

Ted Fowles

Jamel Gross-Cassel, Esq., Smith Gambrell & Russel LLP  
Kaiya Lyons, Esq., American Association for Justice  
Sara Merken, Reuters  
Afton Pavletic  
Rebekah Petroff, Supreme Court Fellow, Federal Judicial Center  
Daniel Steen, Esq., Lawyers for Civil Justice  
Jacqueline Thomsen, Bloomberg  
Jessica Tyler, Delaware Supreme Court  
David White, Delaware Supreme Court  
Avalon Zoppo, National Law Journal  
Angela Brown, Court Reporter  
Scott Myers, Esq., Administrative Office of the U.S. Courts  
Tim Reagan, Esq., Federal Judicial Center

## **I. Opening Business**

Judge Schiltz opened the meeting by welcoming everyone to Minneapolis and to the St. Thomas School of Law. He noted that it was wonderful to host the Committee in his home city and in the law school he helped to found. He explained that the Dean of St. Thomas was unavailable and that the Associate Dean (Judge Schiltz's wife) was also unable to personally welcome the Committee, but that both had asked Judge Schiltz to welcome the Committee to St. Thomas on their behalf.

The Chair then introduced and welcomed three new distinguished members of the Committee: Judge Valerie Caproni, Judge Edmund Sargus, and John Siffert, Esq. The Chair also welcomed Justice Edward Mansfield, the new liaison from the Standing Committee, and Zachary Hawari, the new Rules Law Clerk.

The Chair opened the morning session with an overview of the meeting agenda. He explained that the work of the Advisory Committee is cyclical in nature and that two Rules packages had recently made their way through the Committee process. One package, including a proposal to amend Federal Rule of Evidence 702, is scheduled to take effect on December 1, 2023. A second package of amendment proposals has been approved by the Judicial Conference and sent to the Supreme Court and is scheduled to take effect on December 1, 2024, pending necessary approval. Because the Advisory Committee had recently completed consideration of these amendment packages and cleared most of its agenda, the Chair stated that this meeting would be a “thinking” meeting rather than an “acting” meeting. He explained that the Reporter had invited several top Evidence scholars to make presentations to the Committee regarding amendments they would like to see made to the Evidence Rules, and that he also invited Maura Grossman and Paul Grimm to make a separate presentation on the problems posed by deepfakes. Following all these presentations, the Committee would hold its meeting in the afternoon, to discuss the proposals and to plan the upcoming work of the Committee.

## **II. Evidence Scholars Presentations**

Professor Jeffrey Bellin of the William & Mary Law School gave a presentation urging the abrogation or narrowing of Federal Rule of Evidence 609.

Professor Ed Imwinkelried of the UC Davis School of Law gave a presentation urging clarifications to Federal Rule of Evidence 608(b).

Professor Hillel Bavli of the SMU Dedman School of Law gave a presentation urging amendments to Federal Rule of Evidence 404(b)(2) to curb the admission of other-act evidence where its probative value is based upon character reasoning.

Professor Erin Murphy of the NYU School of Law gave a presentation on the admissibility of evidence of prior false accusations, suggesting amendments to bring clarity and uniformity to the admission of such evidence.

Professor Andrea Roth of the UC Berkeley School of Law gave a presentation on machine-generated evidence and the need for evidentiary protections to ensure the reliability of such evidence presented at trial.

Judge Grimm, Director of the Bolch Judicial Institute at Duke Law, and Professor Grossman of the University of Waterloo, gave a presentation on machine learning and artificial intelligence and on the need for authentication standards that account for deepfakes.

A transcript of all of these presentations has been prepared and will be published in the Fordham Law Review in Spring, 2024.

## **III. Committee Meeting**

### ***A. Approval of Minutes***

The Chair opened the afternoon session by asking for approval of the minutes of the Spring 2023 meeting of the Evidence Advisory Committee. The minutes were unanimously approved.

### ***B. Standing Committee Report***

The Chair then gave a report on the June 2023 meeting of the Standing Committee. He explained that all amendments proposed by the Evidence Advisory Committee had been approved by the Standing Committee with very minor tweaks to either rule or Committee note language. The Chair informed the Committee that the amendment creating Rule 107, covering the use of illustrative aids, had received the most attention from the Standing Committee. He noted that discussion revolved around concerns regarding a notice requirement for illustrative aids. The Chair reminded the Committee that it had removed any notice requirement from the text of proposed Rule 107 before sending it to Standing, but that the Standing Committee had continuing concerns regarding the discussion of notice in the proposed Advisory Committee note. He explained that

the note had been revised as reflected on page 285 of the Agenda materials to remain neutral with respect to providing advance notice of illustrative aids. The Chair also noted that there was some discussion about the improper use of illustrative aids to get inadmissible evidence before a jury. He explained that it is impossible to write a rule to address this concern where the whole point of illustrative aids is that they are not admissible evidence. He also pointed out that judges already have ample tools for preventing juries from being tainted by inadmissible evidence --- tools that judges already use in almost every trial. The Chair noted that, notwithstanding this discussion, Rule 107 and all other proposed amendments had been approved by the Standing Committee and then later by the Judicial Conference.

### ***C. Discussion of Scholar Presentations***

The Chair next raised the topic of the scholar presentations, noting that they had all been fantastic and had made for a very interesting morning. The Chair applauded Judge Grimm and Professor Grossman for delivering a very helpful presentation on AI that was pitched at an accessible level. He expressed his view that the topic of machine-generated evidence merits closer attention and a day-long seminar where there could be an even fuller airing of the hearsay, expert testimony, and authentication issues that it presents. The Chair proposed that the Committee host a full-day seminar on machine generated evidence, including deepfakes and authentication, at its Fall 2024 meeting. He noted that this would give the Reporter a full year to plan the seminar and that the Fall 2024 meeting will be the first for the next Committee Chair. The Committee unanimously agreed to a day-long seminar on machine generated evidence and deepfakes in Fall 2024, with several members expressing interest in potential amendments that would address AI and machine-generated information. The Reporter thanked Judge Grimm and Professor Grossman for their excellent presentation and promised to stay in touch with them regarding potential amendments to address AI. Mr. Lau informed the Committee that a new edition of the *Reference Manual on Scientific Evidence*, including a chapter on the admissibility of artificial intelligence, would be forthcoming in 2024 and may be a valuable resource for the Committee's consideration.

The Chair then asked the Committee members whether there were other proposals presented by the scholars that would merit further attention from the Committee.

#### **1. Rule 404(b) Proposal**

The Federal Public Defender noted that Rules 404(b) and 609 are both critical to defense lawyers and said that the proposed amendments to those rules should be considered. The Committee first discussed the possibility of studying Rule 404(b) with an eye toward an amendment. The Reporter reminded the Committee that Rule 404(b) had been amended in 2020 to add a new notice provision, which requires the prosecution in a criminal case to articulate the non-character reasoning supporting other-acts evidence. He also noted that substantive changes to Rule 404(b) to curb the admissibility of other-acts evidence were considered over a multi-year amendment process and that the Committee had ultimately rejected those substantive changes in favor of the amended notice provision. Ms. Shapiro noted that the issues raised by Professor Bavli's presentation were the same ones that caused the Committee to study and amend Rule 404(b) back in 2020. She reminded Committee members that the Rule 404(b) project lasted for several years and raised many substantive amendment proposals that were rejected in favor of a

new notice provision. She further opined that the notice amendment is still too new for the Committee to consider yet another amendment to Rule 404(b). The Reporter suggested that the Committee may want to consider a substantive amendment to Rule 404(b) if the notice amendment has not succeeded in reining in other-acts evidence. Ms. Shapiro noted that Professor Imwinkelried had suggested in his morning presentation to the Committee that federal courts are “tightening” their application of Rule 404(b).

The Federal Public Defender opined that the Rule 404(b) notice provision is helpful, but that lawyers are not seeing a change in the substantive admissibility of other-acts evidence. The Chair agreed that no substantive contraction in the admission of other-acts evidence was apparent in the federal cases. The Reporter noted that the Third and Seventh Circuit Courts of Appeal were restricting admissibility of other-acts evidence *before* the 2020 amendment to Rule 404(b), which prompted the Committee’s consideration of the provision. Ms. Shapiro noted that the Advisory Committee’s note to the Rule 404(b) notice provision already tracks the language of the Seventh Circuit requiring non-propensity reasoning to support the admission of other-acts evidence. Another Committee member stated that the presentation and discussion had opened his eyes to concerns regarding other-acts evidence and that he would welcome an examination of Rule 404(b). Another Committee member opined that the Committee had already made recent changes to Rule 404(b) and that it should focus on topics like deepfakes for now and wait to see how Rule 404(b) precedent evolves following the 2020 amendment. Two other Committee members opined that the language of Rule 404(b) was not the problem with the provision; rather it is judicial applications of the text that create concerns. One Committee member suggested that adding a requirement that the defendant “actively contest” a point for which other-acts evidence is offered could be beneficial. The Reporter noted that the Committee had explored an “active contest” requirement in considering the 2020 amendment and had rejected it as unworkable.

The Chair expressed reluctance to take up potential amendments to Rule 404(b) at this time. He stated that he agreed that the Rule is misused but that he is not sure it is a problem of misunderstanding. The Chair noted that it made sense to amend Rule 702 to clarify the application of the preponderance standard because lawyers and judges had to travel through Rule 104(a), the *Bourjaily* case, and the Advisory Committee’s notes to find the preponderance standard prior to the most recent Rule 702 amendment. He opined that it was not worth another Rule 404(b) project just to offer modest clarifications, suggesting that it would invite a great deal of controversy for very little return. The Chair suggested that he could envision more substantive changes, such as adding a “primary purpose” test to Rule 404(b)(2), but that such significant changes could pose insurmountable rulemaking obstacles. The Federal Public Defender suggested that the Committee could study Rule 404(b) cases to better understand why the provision is misused. The Reporter noted that he had prepared many research memoranda regarding the application of Rule 404(b) in connection with the 2020 amendment and offered to prepare an overview of the caselaw since the 2020 amendment. In the end, the Committee determined that it would monitor Rule 404(b) case law but would not at this time proceed with any amendment to the rule.

## **2. Rule 609 Proposal**

Several Committee members expressed an interest in examining Rule 609. One Committee member opined that it is important to collect data about how often the possibility of prior-

conviction impeachment actually causes criminal defendants to plead guilty or to decline to testify at trial when they otherwise would. Ms. Shapiro noted that she would be reluctant to consider an amendment to Rule 609. She noted that she was not speaking for the Department on the issue at this preliminary juncture and that she personally supports the ability of a person to move on with his or her life after serving a sentence for a criminal act. That said, she expressed doubt as to whether an amendment to Rule 609 is justified. Specifically, Ms. Shapiro explained that she had doubts about Professor Bellin's assertion that jurors presume that a criminal defendant is guilty when he takes the stand, opining that jurors understand the presumption of innocence. The Reporter responded that Professor Bellin was not suggesting that jurors presume a criminal defendant's guilt of the charged offense. Rather, he was noting that a criminal defendant takes the stand *already impeached* by his inherent bias to avoid conviction, thereby reducing the need for prior-conviction impeachment. The Reporter analogized it to a defendant's impeachment with a prior inconsistent statement, explaining that there would be less need for prior-conviction impeachment if the defendant had already been impeached with a prior inconsistency. According to Professor Bellin, a criminal defendant takes the stand *pre-impeached*, thus reducing the prosecution's need to impeach him further with prior convictions.

Another Committee member noted that there are constituencies that would oppose the complete abrogation of Rule 609 as suggested by Professor Bellin. The Committee member explained that there are some types of prior-conviction impeachment that could be fine-tuned to create fairer and more consistent results across cases. For example, he noted a trial in which a jury was informed that a plaintiff in a civil case had "spent a substantial amount of time in jail" instead of being told that the witness had a prior murder conviction. He suggested that the Committee could explore amendment possibilities to fine-tune Rule 609, rather than eliminate it altogether. Another Committee member agreed that he would like to examine Rule 609 with an eye toward tempering it rather than eliminating it. Another Committee member expressed reluctance to consider Rule 609 at all.

The Reporter outlined three possibilities for amending Rule 609. "Plan A" would be to "burn it down" and eliminate Rule 609 altogether as proposed by Professor Bellin. A "Plan B" would be to eliminate Rule 609(a)(1) felony impeachment for *all* witnesses, preserving automatic impeachment under Rule 609(a)(2) for crimes of dishonesty as to all witnesses, including criminal defendants. A "Plan C" could be to fine-tune the balancing test applicable to criminal defendants under Rule 609(a)(1)(B) to eliminate problematic applications that admit prior convictions very similar to the charged offense. The Reporter suggested that the "Plan A" "burn it down" option would not be workable. The Chair opined that there would be no point in the Committee proposing the elimination of Rule 609 because it would never get through the rulemaking process. He suggested that the Rule is misused because it is a credibility provision that is often used to admit convictions that are tangential to credibility. He further noted the high cost of misuse of the Rule when it prevents a defendant from taking the stand in his own defense. The Chair suggested that it might be possible to narrow Rule 609 to admit only convictions that truly bear on character for truthfulness.

Ms. Shapiro inquired about the direction of the Committee's examination of Rule 609, asking whether complete elimination of Rule 609 was being "taken off the table" and whether any proposal would apply to all witnesses or just to criminal defendants who testify. The Chair opined



that any proposed amendment limiting Rule 609 should apply to all witnesses, as it would be unfair to completely protect the criminal defendant from impeachment while allowing the government witnesses to be freely impeached. The Reporter clarified that a “Plan C” that would tweak the balancing test applicable to criminal defendants under Rule 609(a)(1)(B) would apply to criminal defendants only because that test is reserved for them exclusively. In the end the Committee resolved to consider a possible amendment affecting Rule 609(a)(1) at the next meeting, while retaining Rule 609(a)(2).

### **3. Prior False Accusations Evidence**

Several Committee members expressed an interest in exploring potential amendments to address the admissibility of a victim’s prior false accusations as discussed by Professor Erin Murphy. The Reporter stated that it would be important to determine how frequently such evidence is proffered. He also opined that prior false accusations evidence would be better addressed by an amendment to Article IV, such as a new Rule 416, rather than an amendment to Rule 608(b) because victims may not be testifying witnesses subject to Rule 608. He suggested that a new Rule 416 governing evidence of prior false accusations might simplify the admissibility standards for such evidence. Several Committee members agreed that such an amendment could serve to make trials cleaner and easier and expressed a strong interest in pursuing the project. The Chair agreed that it would be worthwhile to study potential amendments to clarify the admissibility of prior false accusations. He opined that a workable rule could prove difficult to draft, however. Still, he suggested that any amendment belonged in Article IV rather than Article VI and was worth pursuing. In the end the Committee resolved to consider an amendment that would add a new Rule 416 to cover the admissibility of evidence of false accusations.

### ***D. Discussion of Other Potential Amendment Projects***

#### **1. Prior Statements of Testifying Witnesses**

The Reporter next directed the Committee’s attention to Tab 5 of the Agenda materials and the problems with treating the prior statements of testifying witnesses as hearsay. The Chair explained that this issue had always been his pet peeve. He noted that he used to teach Evidence and that students never could understand why the statements made by witnesses who show up to testify are treated as hearsay. He said that students would ask: “don’t we exclude hearsay because the declarant cannot be tested through cross-examination? If a declarant shows up and testifies under oath, he is subject to cross-examination about his prior statements, so why treat them as hearsay at all?” The Chair noted that it was difficult to explain why all prior witness statements should be classified as hearsay. The Chair said that he understood why a trial judge would not want to admit all the prior statements a defendant had made to his family professing his innocence, for example, but noted that Rule 403 would keep out the prior statements that do nothing but bolster the witness.

The Reporter directed the Committee’s attention to pages 365-367 of the Agenda materials and to amendment proposals that would allow *all* prior witness statements to be admitted over a hearsay objection. He explained that one possibility would be to modify the definition of hearsay

to remove witness statements from its ambit. Another possibility would be to retain the current definition of hearsay but exempt all witness statements from the rule in Rule 801(d)(1).

The Reporter noted that both options would permit all *prior consistent statements* made by testifying witnesses to be admitted for their truth. He explained that the substantive admissibility of prior consistent statements is currently tied to rehabilitation under Rule 801(d)(1)(B). If a prior consistent statement will serve to rehabilitate a witness after an impeaching attack by an adversary, it may come in – not only to rehabilitate, but also for its truth. The idea behind the existing exception for prior consistent statements is that they should be admitted substantively when they will be given to the jury to help evaluate credibility in any event. The Reporter explained that the original rule had allowed the substantive use of prior consistent statements in only one narrow circumstance, and that Rule 801(d)(1)(B) had been expanded in 2014 to reach all prior consistent statements that serve to rehabilitate. He suggested that existing Rule 801(d)(1)(B) may be the optimal way to treat prior consistent statements.

The Reporter opined that the real problem with prior witness statements is with the treatment of *prior inconsistent statements* under Rule 801(d)(1)(A). He noted that one potential amendment to Rule 801(d)(1)(A) might allow *all prior inconsistent* witness statements to be admitted for their truth. He noted, however, that cross-examination of the witness at trial is the safeguard justifying admissibility of the prior statement and that some have argued that concerns arise in cases where the witness testifies that he never made the prior inconsistent statement. He explained that Congress added the “under oath” and “prior proceeding” requirements to Rule 801(d)(1)(A), in part, to ensure that the prior inconsistent was *actually made*. If the Committee is concerned about ensuring that the statement was made, it could consider amendment proposals that would expand the methods for ensuring that the statement was actually made akin to the drafts on pages 369-370 of the Agenda materials. An amendment might permit substantive admissibility of a prior inconsistent statement when a witness acknowledges making it or when the statement was recorded in some way, in addition to when it is made under oath in a proceeding.

The Chair opined that whether the witness acknowledges the prior statement should not be a concern. He noted that witnesses deny things all the time and that lawyers have tools to address such denials. The Chair explained that prior inconsistent statements are no different from other types of evidence in that respect. A Committee member agreed that when a witness falsely denies making a prior inconsistent statement, cross-examination can be very effective.

The Reporter noted that the cleanest amendment alternative would be one that allows substantive admission of all witness prior inconsistent statements. The Chair stated that he would support such an amendment but that the question is whether the Committee thinks such an amendment is worth pursuing. The Reporter stated that if he had been asked to make a presentation, like the evidence scholars, about the number one rule that needs fixing, he would have chosen Rule 801(d)(1)(A).

Committee members unanimously agreed that they would be interested in considering an amendment that would make all prior inconsistent statements of testifying witnesses substantively admissible. One Committee member expressed support for an amendment that would make all prior witness statements (consistent or inconsistent) substantively admissible. The Chair noted that

making all witness statements admissible would eliminate the need for the rehabilitation inquiry under Rule 801(d)(1)(B). The Reporter agreed to write up two potential amendment alternatives for the spring meeting – one akin to the draft on page 367 of the Agenda materials that would make *all* prior witness statements admissible – and one akin to the draft on page 369 that would make all prior *inconsistent* statements admissible.

## **2. Statements Made for Purposes of Medical Treatment or Diagnosis**

Professor Richter directed the Committee’s attention to Tab 6 of the Agenda materials and a memorandum regarding the admissibility of statements made for purposes of medical treatment or diagnosis under Federal Rule of Evidence 803(4). She explained that a recent law review article in the *Boston College Law Review* had pointed out some anomalies in the admissibility of hearsay statements under the exception. First, she explained that the exception had been expanded beyond the common law when it was enacted as part of the original Evidence Rules to encompass statements made to testifying medical experts to secure a medical diagnosis for trial. Professor Richter noted that the recent law review article had pointed out the inherent unreliability of such statements made in anticipation of litigation. She explained that the original Advisory Committee had broadened Rule 803(4) to include such unreliable statements made in anticipation of litigation because it assumed that those patient statements would be revealed to the jury at trial as the basis for the testimony of the medical expert. The Advisory Committee’s notes reason that such statements might as well be admissible for their truth if they are going to be disclosed to the jury in any event. Professor Richter explained that the subsequent 2000 amendment to Rule 703 governing the disclosure of the basis for an expert opinion undermined that assumption, because it prohibits the disclosure of otherwise inadmissible basis unless a stringent balancing test is satisfied. She explained that the Committee could consider amending Rule 803(4) to prevent the admission of unreliable hearsay statements made to a testifying medical expert to obtain an opinion for trial, in light of that change to Rule 703. Professor Richter explained that the law review article had also criticized federal decisions uniformly excluding statements made *by medical providers* to one another or to their patients even when those statements otherwise satisfy the requirements of Rule 803(4). She noted that the Committee could consider clarifying amendments to Rule 803(4) to authorize admissibility of provider statements that satisfy Rule 803(4)’s requirements.

Professor Richter directed the Committee’s attention to several potential amendments to Rule 803(4) on pages 387-393 of the Agenda materials, including a draft that would require statements to be made for the “primary purpose” of obtaining medical treatment or medical diagnosis in contemplation of treatment. She noted that such an amendment would eliminate statements made primarily to obtain an expert diagnosis for trial and would also dovetail with the Sixth Amendment standard in criminal cases, ensuring that statements admitted through Rule 803(4) are nontestimonial by definition.

The Reporter opined that the “primary purpose” amendment alternative would be the best option given its consistency with the Sixth Amendment standard. A Committee member expressed ambivalence about an amendment to Rule 803(4) to cover statements by providers, opining that doctors are not entitled to their own hearsay exception. The Chair added that it would be difficult to amend Rule 803(4) to restate its existing requirements with respect to statements made by medical providers. He also noted that the issue of which patient statements are pertinent to a

psychological diagnosis can be particularly vexing but that lawyers are handling such issues. He opined that a “primary purpose” amendment would be the best route but that it could create new litigation problems of determining when the purpose for litigation was primary. In sum, he concluded that an amendment to Rule 803(4) would not be worth pursuing. A Committee member concluded that if the statement to the doctor is made solely or primarily for litigation, that fact will be brought out on cross-examining the doctor, and the jury will be able to discount the patient’s statement in light of the litigation motivation. Another Committee member noted that the evidence rules in many states track the Federal Rules and that states are handling these issues well under their existing rules. He expressed concern that an amendment to Federal Rule of Evidence 803(4) could disrupt state practice. Another Committee member expressed some interest in thinking about the admissibility of provider statements under the exception, noting that medical professionals practice in teams and communicate in the course of providing care. Still, he stated that he was sensitive to the concerns about creating special rules for doctors. The Chair voiced concerns that admitting such chains of provider hearsay could result in fewer trial witnesses on important topics.

In light of these concerns and issues, the Committee concluded that it would not pursue potential amendments to Rule 803(4).

#### **IV. Closing Matters**

The Chair concluded the meeting by explaining that the Committee will consider potential amendments to Rule 609 and Rule 801(d)(1) at the Spring 2024 meeting, as well as a potential new Evidence Rule governing prior false accusations by a victim. He noted that Rule 404(b) and Rule 803(4) will not be on the Committee’s Spring agenda and that the Reporter will plan a symposium on artificial intelligence and machine generated evidence for the Fall 2024 Committee meeting. The Chair thanked the Committee for a productive day and informed the Committee that the Spring 2024 meeting will be on April 19, 2024 in Washington DC. The meeting was then adjourned.

Respectfully Submitted,  
Liesa L. Richter  
Daniel J. Capra

# TAB 2B

# TAB 2B1

**MINUTES**  
**COMMITTEE ON RULES OF PRACTICE AND PROCEDURE**

January 4, 2024

The Judicial Conference Committee on Rules of Practice and Procedure (the Standing Committee) met in a hybrid in-person and virtual session in Austin, Texas, on January 4, 2024. The following members attended:

Judge John D. Bates, Chair  
Judge Paul J. Barbadoro  
Elizabeth J. Cabraser, Esq.  
Louis A. Chaiten, Esq.  
Judge William J. Kayatta, Jr.  
Justice Edward M. Mansfield  
Dean Troy A. McKenzie  
Judge Patricia A. Millett

Hon. Lisa O. Monaco, Esq.\*  
Andrew J. Pincus, Esq.  
Judge Gene E.K. Pratter  
Judge D. Brooks Smith  
Kosta Stojilkovic, Esq.  
Judge Jennifer G. Zipp

The following attended on behalf of the Advisory Committees:

Advisory Committee on Appellate Rules –  
Judge Jay S. Bybee, Chair  
Professor Edward Hartnett, Reporter

Advisory Committee on Criminal Rules –  
Judge James C. Dever III, Chair  
Professor Sara Sun Beale, Reporter  
Professor Nancy J. King, Associate  
Reporter

Advisory Committee on Bankruptcy Rules –  
Judge Rebecca B. Connelly, Chair  
Professor S. Elizabeth Gibson, Reporter  
Professor Laura B. Bartell, Associate  
Reporter

Advisory Committee on Evidence Rules –  
Judge Patrick J. Schiltz, Chair

Advisory Committee on Civil Rules –  
Judge Robin L. Rosenberg, Chair  
Professor Richard L. Marcus, Reporter  
Professor Andrew Bradt, Associate  
Reporter  
Professor Edward H. Cooper, Consultant

Others who provided support to the Standing Committee, in person or remotely, included Judge J. Paul Oetken, Chair of the Joint Subcommittee on Attorney Admission; Professor Catherine T. Struve, the Standing Committee's Reporter; Professor Daniel R. Coquillette, Professor Bryan A. Garner, Professor Joseph Kimble, and Joseph F. Spaniol, Jr., Esq., consultants to the Standing Committee; H. Thomas Byron III, Esq., Secretary to the Standing Committee; Allison A. Bruff, Esq., Bridget M. Healy, Esq., and S. Scott Myers, Esq., Rules Committee Staff Counsel; Shelly Cox, Rules Committee Staff; Zachary Hawari, Law Clerk to the Standing

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\* Elizabeth J. Shapiro, Deputy Director, Federal Programs Branch, Civil Division, represented the Department of Justice (DOJ) on behalf of Deputy Attorney General Lisa O. Monaco.

Committee; Hon. John S. Cooke, Director of the Federal Judicial Center (FJC); and Dr. Tim Reagan, Senior Research Associate, FJC.

### OPENING BUSINESS

Judge John Bates, Chair of the Standing Committee, called the meeting to order. He welcomed attendees and members of the public, including those who were attending remotely. He also welcomed new Standing Committee members Justice Edward M. Mansfield and Louis A. Chaiten, Esq. Judge Bates recognized Professor Joseph Kimble for his selection by the Michigan State Bar to receive the Roberts P. Hudson Award for his service to the Bar and legal profession. He also noted that Professors Kimble and Garner deserve a lot of credit for their work on restyling the federal rules.

Upon motion by a member, seconded by another, and without dissent: **The Standing Committee approved the minutes of the June 6, 2023, meeting.**

Mr. Thomas Byron, Secretary to the Standing Committee, noted that the latest set of proposed rule amendments had been submitted to the Supreme Court for review and, if all goes smoothly, will be transmitted to Congress in the spring to take effect on December 1, 2024.

Judge Bates remarked that it is good for the Standing Committee to be aware of the projects underway by the FJC and that a short memorandum regarding that work begins on page 94 of the agenda book. Dr. Reagan explained that the FJC assigns liaisons to various Judicial Conference committees and conducts empirical research for the committees. The FJC's role, he explained, is to contribute methodological expertise and objective research capacity without taking policy positions. Judge Bates thanked the FJC for the continuing support and superb research done on behalf of the Rules Committees.

### JOINT COMMITTEE BUSINESS

#### *Joint Subcommittee on Attorney Admission*

Judge J. Paul Oetken, chair of the Joint Subcommittee on Attorney Admission and a member of the Bankruptcy Rules Committee, and Professors Struve and Bradt reported on this item. A written report starts on page 101 of the agenda book. The joint subcommittee is considering a proposal from Dean Alan Morrison and others to make admission to the bars of the federal district courts more uniform.

Professor Struve noted the joint subcommittee was in the early stages of its work and thanked its members, who represent the Bankruptcy, Civil, and Criminal Rules Committees. She explained that the Morrison proposal highlights the variation in the criteria for admission to the bars of district courts. It notes that many federal districts require membership in the bar of the state in which the district is located, and in four states this in effect requires that lawyers pass the local state bar exam in order to be admitted to the district court bar. The proponents point out that the admission requirements can be time consuming and expensive and that seeking admission pro hac vice can also be burdensome given varying local counsel requirements and fees. They argue there is no reason for a district court to require in-state bar admission. Their petitions for various restrictive districts to change their local provisions have been unsuccessful.



The proposal contains three options. Option One is to centralize attorney admission and discipline within the Administrative Office of the United States Courts (AO), allowing attorneys in good standing in any state bar to be admitted to practice in any federal district court. Option Two provides that admission in any district court would entitle an attorney to practice in all other districts but would not centralize the process within the AO. Option Three bars district courts from having a local rule that would require in-state bar admission as a condition of admission to practice in the district court.

Professor Struve explained that there have been periodic discussions about attorney admission criteria over the last 90 years. An attorney proposed a nationwide rule for the district courts in 2002, but it did not garner much rulemaking interest or discussion. In the early 2000s, Professor Coquillette examined the adjacent, but separate, topic of centralizing federal rules on attorney conduct, which received a lot of pushback. Professor Coquillette added that the DOJ was the moving party for the unified rules of attorney conduct, but every bar association was against it.

Professor Struve noted that Appellate Rule 46 is one model that already exists in the national rules. It provides for admission to the courts of appeals based on an attorney being of good moral and professional character and being admitted to practice in the United States Supreme Court, a state high court, or another federal court.

The joint subcommittee held its first meeting in October 2023. There was no interest in adopting Option One. There were questions of feasibility and concerns that a centralized office within the AO would lack the local knowledge and contacts required for effective attorney discipline proceedings.

There was some interest in Options Two and Three. In-state admission requirements are particularly burdensome, especially in states that require taking the bar exam for admission. But members were mindful of the local courts' interests in protecting the quality of law practice. Additionally, courts use admission fees for funding important work, and there could be revenue effects. The subcommittee was inclined to consider models with elements of Options Two and Three. There would likely still be separate applications to each district in which one wishes to practice and perhaps fees as well.

The subcommittee also recognized the need to be mindful of rulemaking authority and 28 U.S.C. § 1654, which refers to the rules of courts that permit attorney admission. However, the existence of Appellate Rule 46 suggests rulemaking on attorney admissions has not been foreclosed. Professor Coquillette recalled that some senators had offered to pass legislation giving the Rules Committees power to make rules involving attorney conduct. Going forward, the subcommittee plans to look further into these issues.

Professor Struve also reported that, in response to the agenda book materials, Dean Morrison and others explained that their primary goal is to eliminate barriers that prevent lawyers who are admitted to practice in one district from practicing in another. While not wedded to centralizing admission, they would suggest addressing district variation in how often attorneys must renew their licenses and how much the court charges. They have no interest in removing authority from individual districts to discipline attorneys.

Judge Bates explained that he populated the joint subcommittee with people from jurisdictions with different approaches so there will be a thorough examination through the subcommittee process. There are a lot of issues, and it is a pretty important matter for many courts across the country and for the Bar.

An academic member commented that Option Three has the most promise as there is no good reason today to require in-state bar admission. A practitioner member echoed that Option Three has the best chance of progressing. He acknowledged that there may be something to be served by requiring membership in the local bar but offered three points in support of something like Option Three. First, he noted that in-state bar admission is not a great proxy for experience. For example, he practiced in a particular district for years as an Assistant United States Attorney but was not able to be admitted as a private attorney because he was not barred in that state. Second, the concern around pro hac vice fees can be dwarfed by fees paid to local counsel. Third, reciprocity is not a full solution because defense attorneys must go wherever the case is.

A judge member made the point that spouses of military service members face extraordinary barriers when trying to maintain legal careers while moving around the country every few years. She emphasized the considerable difficulty and cost of admission to state bars and noted that many states already make exceptions to their bar requirements for military spouses. There is also a need to reduce the variable expenses, or possibly make an exception, for military spouses and others who cannot afford these expenses. Option Three should be the bare minimum and would show respect for military service members and their spouses.

Judge Bybee agreed that this project is well worth the effort to study. He noted, however, that diversity cases are an area in which attorneys need to know the state law. The state bar might object to an out-of-state attorney taking a matter from state court directly to federal court. That argument is less compelling for other forms of jurisdiction, but it is not clear how the rules could distinguish between diversity jurisdiction cases as opposed to other or mixed jurisdiction cases.

Professor Struve noted that the subcommittee had not yet considered the issue, but Dean Morrison's proposal attempted to rebut the diversity case argument in his submission.

Another judge member asked what it would cost to initiate Option One at the AO. She also asked about the range of fees across the country for admission pro hac vice, noting that such fees were a substantial source of court income in her district. She suggested that it might be desirable to encourage parity among those fees.

Professor Struve indicated the subcommittee had not conducted its own systematic study yet, but they had been informed that pro hac vice admission fees can reach \$500 in some districts.

Another judge member questioned the aptness of the analogy between appellate and district practice given how circumscribed the responsibilities of counsel are on appeal as compared to litigation in the district court. Additionally, he would be cautious about making changes that would make cases less likely to feature repeat players; in his experience, the involvement of attorneys who are known to the court tends to increase the quality of practice.

Another judge member observed that there are many concerns wrapped up in this issue and many ways those concerns could be addressed. Option Three is the most promising. But it is

important to involve state bars in some respect because it is important for district courts and state bars to work together to monitor attorney practice and discipline. Option One is less preferable because it could lead to lower standards. She also noted that it has become more common for attorneys to practice remotely or in another close-proximity jurisdiction. Her district had an issue with attorneys who were living and practicing in the state but applying pro hac vice in every case, seemingly to get around the in-state bar requirement. If the rulemakers were to adopt an approach that mandates reciprocity, it may be that an attorney who lives in a particular jurisdiction for a certain amount of time should be required to be admitted to that bar, possibly with an exception for military spouses.

A practitioner member expressed sympathy for this proposal as someone who spends a great deal of time and money getting admitted pro hac vice in federal courts across the country. But he asked whether districts that require in-state bar admission justify that requirement based on better behavior from repeat, in-state attorneys. He also asked if the subcommittee had looked at whether it would be unauthorized practice of law for an attorney to litigate a lengthy diversity case in federal court without being admitted to that state's bar.

Professor Struve responded that the subcommittee had not yet looked into that issue but that it can.

A judge member noted that these issues are not limited to diversity cases. A federal case often has a federal claim with numerous state law claims under supplemental jurisdiction. There is a concern that, despite soliciting clients within a state, a national practitioner who can only represent clients in federal court might be less familiar with state law that can, at times, afford the plaintiff greater relief than federal law.

Judge Bates thanked the subcommittee for its work so far. He noted that the authority question is particularly important with respect to Option One but is not necessarily eliminated with respect to the other approaches. More examination needs to be done.

Judge Oetken thanked the members of the Standing Committee for their helpful comments.

#### *Service and Electronic Filing by Self-Represented Litigants*

Judge Bates introduced this agenda item, which appears on page 182 of the agenda book, and invited Professor Struve to provide an update.

Professor Struve reported that the pro se electronic filing and service working group is studying two topics: (1) whether to take steps to increase electronic access to the court for self-represented litigants by CM/ECF or otherwise and (2) whether self-represented litigants need to traditionally serve their papers on litigants who will receive a notice of electronic filings anyway. The report in the agenda book summarizes spring 2023 interviews that Professor Struve and Dr. Reagan conducted with officials in district courts. She expressed gratitude to Dr. Reagan and his colleagues for their work.

The working group hopes to develop concrete proposals on both issues for the advisory committees in their spring meetings. One potential proposal discussed in concept at the fall meetings, without eliciting immediate expressions of concern, was a rule that would set a baseline

requirement that districts that disallow CM/ECF access for self-represented litigants would need to make reasonable exceptions to that policy.

#### *Electronic-Filing Deadlines Joint Subcommittee*

Professor Struve reported on this topic. In 2019, Judge Michael Chagares proposed a study on whether the national rules on computing time should be amended to set the presumptive deadline for electronic filing earlier than midnight. In 2023, the Third Circuit adopted a local rule moving the filing deadline back in that court of appeals from midnight to 5:00 p.m. The E-Filing Deadlines Joint Subcommittee met in August 2023 and voted unanimously to recommend that no action be taken and that the subcommittee be disbanded. The Advisory Committees endorsed this recommendation at their fall meetings and removed the topic from their agendas.

Judge Bates asked if the Standing Committee had any objection to disbanding the joint subcommittee and putting this issue to rest for the moment. Hearing no objection, Judge Bates disbanded the joint subcommittee and removed the matter from the agenda. The Committee will monitor how things play out in the Third Circuit.

#### *Redaction of Social Security Numbers*

Mr. Byron reported that the advisory committee reporters have begun to discuss Senator Ron Wyden's proposal to require complete redaction of Social Security numbers in court filings, instead of the current requirement in the privacy rules of redacting all but the last four digits of those numbers. The reporters' discussions are still in the early stages.

Professor Marcus noted the likelihood that this project, and thus the Standing Committee, will need to confront the question of whether the various sets of rules should continue to take a uniform approach to this topic.

Mr. Byron elaborated that a desire for uniformity was one historical motivation for the current rules. The Bankruptcy Rules Committee had identified the last four digits of a Social Security number as being extremely valuable in bankruptcy cases for creditors and other participants. The other committees essentially deferred to the Bankruptcy Rules Committee on this issue and also required redaction of all but the last four digits. The working group is currently reconsidering whether uniformity is still a predominant concern that should overrule other concerns such as privacy or identity theft. There are also already some variations among the rule sets. One issue is whether the Criminal, Civil, and Appellate Rules Committees want to consider requiring full redaction.

#### *Privacy Report*

Judge Bates asked Mr. Byron to report on the status of the 2024 report to Congress.

Mr. Byron explained that the Judiciary has an ongoing statutory obligation to study and report to Congress every two years on the adequacy of the privacy rules. Rules Committee Staff has been working with staff from the Committee on Court Administration and Case Management (CACM) on the privacy report. CACM has requested some FJC research projects that are relevant

to this question, but those projects likely will not be completed in time to fully report their results to Congress this year.

Ideally, a draft report will be ready in time for the Standing Committee to consider and approve at the June meeting.

## REPORT OF THE ADVISORY COMMITTEE ON APPELLATE RULES

Judge Bybee and Professor Hartnett presented the report of the Advisory Committee on Appellate Rules, which last met on October 19, 2023, in Washington, D.C. The Advisory Committee presented several information items and no action items. The Advisory Committee's report and the draft minutes of its last meeting are included in the agenda book beginning at page 219.

Judge Bybee updated the Standing Committee on two proposals out for public comment. The Advisory Committee has received one comment on the proposed amendment to Rule 39. It has received no comments on the proposed amendment to Rule 6, which involves some very complicated changes dealing with direct appeals in bankruptcy cases. Judge Bybee thanked the Bankruptcy Rules Committee and others who commented on those changes prior to publication. The Advisory Committee will not hold hearings on Rules 6 and 36 due to a lack of requests to testify and expects to seek final approval from the Standing Committee in June 2024.

### *Information Items*

***Amicus Disclosures.*** Judge Bybee and Professor Hartnett reported on this item. The Advisory Committee hopes to have a proposal before the Standing Committee in June 2024.

Professor Hartnett provided background on the proposal. The Advisory Committee reviewed proposed legislation, the AMICUS Act, which would have treated repeat amicus curiae filers like lobbyists, requiring them to register and to disclose contributors who had provided 3% or more of their revenue. That approach was rejected by the Advisory Committee because there is a difference between lobbying and submitting a public amicus brief to which there is an opportunity to respond. On the other hand, sometimes judges care not only about the contents of an amicus's arguments but also who the amicus is.

The Advisory Committee has tried to balance disclosure with free speech and free association rights. The current draft recognizes the distinctions (a) between contributions by a party and by a nonparty and (b) between contributions earmarked for the preparation of a brief and contributions to the organization generally. For example, the 25% threshold for disclosure is meant to avoid discouraging speech and association while recognizing that this level of contribution could give the contributor real influence on the speech. Striking this balance also informed how to set a de minimis threshold amount for disclosure of earmarked contributions by a nonparty.

The Advisory Committee has narrowed down the questions at issue, and Judge Bybee reported on three recent developments.

First, as to the appropriate lookback period for determining contributions by a party, the Advisory Committee had considered whether the proposed rule should use a fiscal year or the 12-

month period preceding the brief's filing. Neither was perfect, but the Advisory Committee has arrived at an elegant solution and would welcome feedback. To determine the threshold contribution amount that would require disclosure, this approach would multiply the amicus's prior fiscal year revenue by 25% and see whether a party had contributed more than that dollar amount within the last 12 months. This effectively combines the two periods into a single, easily calculable figure and closes a potential loophole.

Second, the proposed amendment had incorporated language from the AMICUS Act that would have excluded from disclosure certain amounts received in the "ordinary course of business." But no one was sure what that language meant, and it did not seem essential. To simplify matters, the Advisory Committee has deleted that phrase from the proposed amendment.

Third, the current rule broadly requires disclosure of any contribution earmarked for a particular brief, but it exempts contributions by members of the amicus. That was seen by some as a loophole because it allowed someone to join an amicus at the last minute and avoid disclosure. The Advisory Committee proposed setting a de minimis contribution amount of \$1,000 that would not be reportable even when earmarked for the preparation of a brief. This avoids problems arising with a GoFundMe-style amicus brief. For any contribution over \$1,000, it must be disclosed unless it comes from someone who has been a member for at least 12 months. Anyone who has been a member for less than 12 months is treated like a nonmember.

Judge Bybee welcomed any input from the Standing Committee.

Judge Bates thanked Judge Bybee, Professor Hartnett, and the Advisory Committee for their work. This important project began with communications from members of Congress to the Supreme Court. The matter was referred to the Standing Committee and then to the Advisory Committee. It has a lot of ramifications and has drawn public and congressional interest.

A judge member agreed that these are elegant solutions and commended the Advisory Committee for its work. Regarding the last sentence of subdivision (d), she recalled the concern expressed about individuals joining an amicus for the purpose of contributing toward a brief. She inquired whether that is a problem, and, if so, whether such individuals would now get around having to disclose that they are funding a brief by creating a new amicus, rather than joining an existing one.

Judge Bybee explained the Advisory Committee's sense that there are people who are willing to form an amicus organization with a name that completely obscures who is behind it. To address this issue, under subdivision (d), while the amicus need not disclose the contributing members if the amicus has existed for fewer than 12 months, it must disclose the date of creation. There is also a new provision in Rule 29(a)(4)(D), requiring a concise description of the identity, history, experience, and interests of the amicus curiae, together with an explanation of how the brief and the perspective of the amicus will be helpful to the court.

A practitioner member commented that, unsurprisingly, there are people that see a case and would like to influence it without filing briefs in their own names, so they form organizations to do so. The disclosure of the date of creation is a check on this. It will flag to the reader that this is

an organization that does not have a long-standing interest or was formed for the purpose of filing an amicus brief if, for example, it was formed after the case was filed.

Another practitioner member added that nothing is perfect, but this solution does address the issue and provides relevant disclosure.

Another judge member also thought that the solution in subdivision (b) was elegant. However, the concern addressed in that subdivision (the relationship between the amicus and a party) was probably not the concern motivating the legislators who submitted the suggestion. It is more of a judicial-looking concern about the adversarial process. He expressed ambivalence on that issue because he was not sure how he would make better, or different, use of amicus briefs if he knew more about who was behind them beyond what they say and who the lawyers are.

Instead, subdivision (d) is directly responsive to the legislators' concerns, and some additions may be needed to guard against engineering to circumvent subdivision (d). For example, if someone funded an organization up front and it does the amicus briefing, would the amicus need to say anyone contributed funds for the brief? The Advisory Committee may want to consider something like submitting or drafting "briefs"—rather than "the brief," that is a particular brief—to capture an organization that is funded generally to file amicus briefs in a certain type of litigation.

A practitioner member wondered whether the \$1,000 threshold is too high. It would not require that many like-minded payers each contributing \$999 to fund a brief. If the focus is on GoFundMe campaigns, an amount in the \$100 range might be more appropriate and make it much more difficult for a group of wealthy people to fund a brief through \$999 contributions.

Judge Bates observed that a perfect product is not achievable here. He asked Judge Bybee to address another issue regarding whether to follow the Supreme Court in its recent change to permit amicus briefs without requiring leave of court or consent of the parties.

Judge Bybee explained that the current proposal follows the Supreme Court Rules in not requiring leave of court or consent of the parties. However, the Supreme Court recently issued its own ethics guidelines noting that it has different concerns from lower appellate courts due to the dynamics of disqualification. There is a rule of necessity at the Supreme Court under which the Justices will not regularly recuse due to amici, but that has not been the practice in courts of appeals. Large courts with sophisticated systems for identifying possible conflicts can fairly easily work around an amicus brief if it requires a judge's recusal at the panel stage. But it can be more complicated when the appeal progresses to en banc proceedings where an amicus could strategically file a brief to ensure the disqualification of a judge. The Advisory Committee is still thinking about these issues and would welcome thoughts on whether the rule should revert to the motion requirement to forestall the problem of a strategic en banc amicus filing.

Judge Bates remarked that he hoped that this discussion had been beneficial to the Advisory Committee's continuing efforts and that the Standing Committee would look forward to the next step.

***In forma pauperis.*** Judge Bybee reported that the Advisory Committee has been working diligently and conducting surveys on in forma pauperis status and expected to have a proposal before the Standing Committee in June 2024.

***Intervention on appeal.*** Judge Bybee reported that there is a subcommittee considering intervention on appeal. Although there is not yet a working draft, the subcommittee would appreciate getting a sense of where the Standing Committee stands on this issue. It is a controversial issue that has been studied by the Advisory Committee before, and it came up recently in the Supreme Court.

An academic member thought it would be a worthwhile undertaking to consider what a rule on intervention on appeal might look like. In teaching the relevant cases, he was surprised to learn about the system in the courts of appeals for handling intervention on appeal. They have tried to borrow Civil Rule 24, which itself has ambiguities and difficulties, to fit in the appellate structure. That might be fine because intervention on appeal should not be common. But he would encourage the Advisory Committee to think through this issue, which has come up so frequently in the last few years.

Judge Bybee thanked the Standing Committee for its comments, and Judge Bates thanked Judge Bybee and Professor Hartnett for their report.

## **REPORT OF THE ADVISORY COMMITTEE ON BANKRUPTCY RULES**

Judge Connelly and Professors Gibson and Bartell presented the report of the Advisory Committee on Bankruptcy Rules, which last met on September 14, 2023, in Washington, D.C. The Advisory Committee presented three action items and several information items. The Advisory Committee's report and the draft minutes of its last meeting are included in the agenda book beginning at page 249.

Judge Connelly reported that the Advisory Committee has been active, engaged, and productive. She thanked the reporters for the terrific job they have done.

### *Action Items*

***Proposed amendment to Rule 1007(h) (Interests in Property Acquired or Arising After a Petition Is Filed).*** Judge Connelly reported on this item. The text of the proposed amendment appears on page 256 of the agenda book.

Generally, everything a debtor owns becomes part of the bankruptcy estate. Rule 1007 sets a timeline for the debtor to file schedules of the estate's property. It also provides a deadline and mechanism for filing a supplemental schedule for certain types of property interests listed in Bankruptcy Code Section 541(a)(5) that the debtor acquires within 180 days after filing the petition.

However, bankruptcy cases under Chapters 11, 12, and 13 of the Code can take three to five years or longer to resolve, and property the debtor acquires during this period is also property of the estate. The proposal would amend Rule 1007 to account for supplemental schedules to list



those other postpetition property interests that the debtor acquires and that become property of the estate under Bankruptcy Code Section 1115, 1207, or 1306.

Courts have been managing this issue through local rules and administrative orders, and this rule would dispel any concern about whether local courts have the authority to do so. Local management is important because courts have different interpretations about whether a debtor has an ongoing obligation to report postpetition acquisitions other than what is currently required under Rule 1007(h). The Advisory Committee did not want to adopt a particular position on those questions. The proposal also serves to put the debtor and counsel on notice that the court might require the filing of a supplemental schedule.

An academic member commented that this seems like an opportunity to fill a gap in the rules. He recalled researching cases where, for example, a debtor has a valuable cause of action, seeks to pursue it post-bankruptcy, and could be estopped from asserting it later for failure to disclose it. However, given that case law has developed, he questioned whether there is a need for rulemaking. He does not object to publication but is nervous about unintended consequences.

Professor Bartell noted that this proposal does not address judicial estoppel for a cause of action that a debtor had at the time of filing the petition and failed to disclose. It only addresses postpetition assets. It is a weaker version of the original proposal, which would have created a mandatory rule for disclosure. That created problems with how to craft a test for what to disclose. Instead, this proposal empowers local courts to impose a disclosure requirement if they wish to do so.

Professor Gibson added that courts disagree about whether, in the absence of a request by a party, a U.S. trustee, or the court, a debtor in this situation has a continuing duty to reveal postpetition property. It would be helpful for courts that believe there is such a continuing duty to make that fact clear, because failure to satisfy that duty could lead to judicial estoppel.

Judge Connelly sought approval to publish the proposed amendment for public comment. Upon motion by a member, seconded by another, and without opposition: **The Standing Committee gave approval to publish the proposed amendment to Rule 1007(h) for public comment.**

***Proposed amendment to Rule 3018 (Chapter 9 or 11—Accepting or Rejecting a Plan).*** Judge Connelly reported on this item. The proposed amendment starts on page 258 of the agenda book.

Rule 3018 governs creditor acceptance or rejection of a Chapter 9 or Chapter 11 plan for reorganization. Although Chapter 9 municipal reorganizations are pretty rare, Chapter 11 reorganizations are very common. (Chapter 11 reorganizations ordinarily involve a business debtor but could involve an individual debtor.) Plan confirmation criteria will be different depending on whether creditors have accepted the plan.

Under Rule 3018, creditors have an opportunity to vote on a plan by indicating acceptance or rejection through a written ballot. The proposal would amend subdivisions (a) and (c) to permit courts to also consider an acceptance—or the change or withdrawal of a rejection—that is made

by a creditor's attorney or authorized agent and is part of the record. That can be done orally at the confirmation hearing or by stipulation.

This proposal addresses two common practices. First, parties are often heavily involved in negotiations leading up to the plan confirmation hearing. This proposal would facilitate effective negotiations by allowing the court to consider acceptances at the confirmation hearing reflecting those negotiations. Second, creditors are not required to vote, and some do not vote at all for a variety of reasons. Most, but not all jurisdictions, do not treat a nonvote as an acceptance. This proposal would reduce the practical difficulties of submitting a written ballot in a four-to-five-week period. While that turn-around time has not proven a challenge for the private sector, it may be a barrier for the government, which is the least likely creditor to vote. Among other reasons not to vote, getting authorization from the Secretary of the Treasury in that timeframe may present an issue for the IRS. This rule would create a potential opportunity for the IRS to participate by authorizing the DOJ to accept a plan.

This proposal is particularly important for small businesses. Subchapter V of Chapter 11 was enacted in 2020 to allow a special fast track for small businesses that cannot typically afford regular Chapter 11 practice. If a subchapter V plan is confirmed as consensual with sufficient acceptances, discharge occurs, the debtor may exit Chapter 11, and the subchapter V trustee's service ends. That means the small business is not burdened with continuing administrative expenses. In contrast, if there are not sufficient acceptances, the debtor does not get an immediate discharge and must remain under the court's purview throughout the plan period. The subchapter V trustee is also the disbursing agent throughout this process. So, there are administrative expenses, and remaining in Chapter 11 for multiple years may have an impact on the business.

Judge Connelly acknowledged that the government expressed concern about this proposal during the Advisory Committee's discussions. The Advisory Committee felt publishing the proposal would provide useful feedback and give the government more time to review it.

Ms. Shapiro explained that the government opposed the proposal in the Advisory Committee because it was concerned that the rule change would pressure the government to accept plans that it lacks the resources to fully review. There was also concern that the change from requiring written acceptances to permitting oral acceptances might result in judges pressuring Assistant United States Attorneys to accept a plan that was not able to go through the process for government review and approval. That said, the government will vote in favor of publication, and it intends to submit a letter to the Advisory Committee setting out its concerns.

A judge member expressed that, while he had no issue with the rule, he wondered whether its structure worked. Current Rule 3018(a)(3) seems to require cause for any change or withdrawal of acceptance or rejection. The proposed additional text in Rule 3018(a)(3)—“The court may also do so as provided in (c)(1)(B)” —appears to permit the court to permit the change or withdrawal of a rejection without cause. It seems the tail has grown much larger than the dog here.

Professor Gibson acknowledged the judge member's point. She noted that courts are already accepting settlements and changes from rejections to acceptances at the confirmation hearing even without the rule explicitly allowing it.

Judge Connelly sought approval to publish the proposed amendment for public comment. Upon motion by a member, seconded by another, and without opposition: **The Standing Committee gave approval to publish the proposed amendment to Rule 3018(a) and (c) for public comment.**

***Proposed amendment to Official Form 410S1 (Notice of Mortgage Payment Change).*** Judge Connelly reported on this item. The proposed revised form starts on page 260 of the agenda book.

Proposed amendments to Rule 3002.1, which require mortgage creditors in a Chapter 13 case to disclose payment changes and other details that occur over the course of the case were published for public comment in 2023. The proposal addresses home equity lines of credit (HELOCs), among other issues. There can be a lot of variation in HELOC payments, and the proposed rule would allow the notice of change to be made either at the time of the change or annually with a reconciliation amount.

One of the public comments to Rule 3002.1 noted a need to update the official form to implement this change. The forms subcommittee determined that Official Form 410S1 should be revised to provide space for an annual HELOC notice at Part 3. If the proposed amendment is published in 2024, the form will be on the same timeline to take effect as proposed Rule 3002.1.

Judge Connelly sought approval to publish the proposed amendment for public comment. Upon motion by a member, seconded by another, and without opposition: **The Standing Committee gave approval to publish the proposed amendment to Official Form 410S1 for public comment.**

#### *Information Items*

Judge Connelly stated that none of the information items mentioned in the Advisory Committee’s report required approval or specific feedback at this time. She elaborated on two items.

***Reconsideration of proposed Rule 3002.1 (Notice Relating to Claims Secured by a Security Interest in the Debtor’s Principal Residence in a Chapter 13 Case).*** At the June 2023 Standing Committee meeting, Judge Connelly requested permission to publish extensive changes to Rule 3002.1, including amendments to the subdivision addressing noncompliance that would authorize the court to enforce the rule by awarding noncompensatory sanctions. There was a robust discussion at the meeting, and, at Judge Connelly’s request, Rule 3002.1 was published for comment without the provision on noncompensatory sanctions so that the Advisory Committee could discuss the points raised by the Standing Committee.

The Advisory Committee will defer further discussion of that subdivision for now, pending consideration of the public comments on Rule 3002.1 and further development in the case law.

***Remote testimony in contested matters.*** The Advisory Committee is considering a proposal to address the procedure for a bankruptcy judge to permit remote testimony in contested matters in bankruptcy cases. The proposed amendments were discussed in September, but the Advisory Committee deferred any recommendation so that certain Judicial Conference

committees, particularly CACM, could be informed and have an opportunity to provide input. The Advisory Committee plans to consider the proposal further at its meeting in April, and there will probably be an agenda item on this topic for the Standing Committee’s meeting in June.

Professor Marcus observed that Civil Rule 43(a)’s strong presumption in favor of non-remote open-court testimony might in future be altered based in part on experience under the Bankruptcy Rules.

Judge Bates thanked Judge Connelly and the Advisory Committee.

### **REPORT OF THE ADVISORY COMMITTEE ON CIVIL RULES**

Judge Rosenberg and Professors Marcus and Bradt presented the report of the Advisory Committee on Civil Rules, which last met on October 17, 2023, in Washington, D.C. The Advisory Committee presented several information items and no action items. The Advisory Committee’s report and the draft minutes of its last meeting are included in the agenda book beginning at page 288.

Judge Rosenberg updated the Standing Committee on proposals out for public comment. In August 2023, proposed amendments to Rules 16 and 26, dealing with privilege log issues, and a new Rule 16.1 on multidistrict litigation (MDL) proceedings were published for public comment. Public comments can be viewed on the regulations.gov website, and a summary of the comments will be provided in the Advisory Committee’s spring agenda book. The Advisory Committee is holding three public hearings on these changes. Twenty-four witnesses testified at the first hearing, which was held in person in Washington, D.C., on October 16, 2023. The next two hearings are scheduled for January 16 and February 6, 2024, and will be conducted remotely. So far, there have been 16 written submissions for the January 16 hearing and 32 witnesses scheduled to testify. Another 24 witnesses are currently scheduled for the February hearing.

#### *Information Items*

**Rule 41 Subcommittee.** Judge Rosenberg and Professor Bradt reported on this item.

Judge Cathy Bissoon chairs the subcommittee considering Rule 41(a). There is a circuit split about the meaning of the word “action” in Rule 41(a)(1)(A), which allows the plaintiff to dismiss an action by filing a notice or stipulation of dismissal. Some courts only allow an entire action to be dismissed, not a claim or an action against a particular party. Those courts require an amendment under Rule 15 for dropping anything less than the entire action.

The subcommittee has engaged in outreach to several attorney groups since the last report to the Standing Committee, including Lawyers for Civil Justice, the American Association for Justice, and the National Employment Lawyers Association. The subcommittee also sent a letter to federal judges through the Federal Judges Association. There were only eight responses, which were somewhat ambivalent and reflected different interpretations of the rule.

Judge Rosenberg reported that, to date, there have been sketches of possible rule amendments but no concrete proposals. There will be a subcommittee meeting before the April Advisory Committee meeting, and it is possible that the subcommittee may agree upon a proposal

to present to the full committee. An amended rule could clarify how much leeway a plaintiff has to dismiss something less than the entire action and whether that should extend to individual claims. Tangential considerations include the deadline by which a plaintiff can voluntarily dismiss without a stipulation or court order, who must sign a stipulation of dismissal, and which dismissals should be with or without prejudice.

Professor Bradt added that in the subcommittee's extensive outreach, the first question was whether there is a real-world problem for litigants. The answer seems to be yes, particularly in jurisdictions that interpret the rule to allow voluntary dismissal only of the entire action. That often leads to makeshift solutions, serial amendments to complaints, and follow-on motion practice and pleadings. The rough consensus of the members of the subcommittee seems to be that the rule ought to be more flexible than limiting dismissal to the entire action, but the degree of flexibility will be debated at upcoming meetings.

***Discovery Subcommittee.*** Judge Rosenberg and Professor Marcus reported on this item. Chief Judge David Godbey chairs the Discovery Subcommittee. Judge Rosenberg noted that a number of issues were being considered by the subcommittee.

*Serving subpoenas.* The first issue is service of subpoenas under Rule 45(b)(1), and discussion begins on page 294 of the agenda book. There is some ambiguity on whether service is satisfied by something other than in-hand service. The prior Rules Law Clerk prepared an extensive memorandum on the requirements in state courts. There was no consistent thread to provide guidance, but the subcommittee has concluded that the rule's ambiguity has produced sufficient wasteful litigation activity to warrant an effort to clarify the rule.

The subcommittee's consensus was that requiring in-person service in every instance was not desirable. The proposed sketch at page 295 in the agenda book materials would permit subpoena service by any means of service authorized under Rule 4(d), (e), (f), (h), or (i), or authorized by court order or by local rule if reasonably calculated to give notice.

Professor Marcus noted that this is a work in progress. At the Advisory Committee meeting, the DOJ raised concerns about the inclusion of Rule 4(i), and the Advisory Committee expects to hear more.

*Filing under seal.* Judge Rosenberg reported that the next issue relates to filing under seal. The Advisory Committee has received a number of submissions urging that the rules explicitly recognize that a protective order under Rule 26(c) invokes a good cause standard, rather than the more demanding standards in the common law and First Amendment context for sealing court files. The subcommittee discussed making an explicit distinction between filing under seal and the issuance of a protective order for materials exchanged through discovery. It has developed a proposed sketch for Rule 26(c)(4) and Rule 5(d)(5), appearing on page 297 of the agenda book, and feedback would be welcome.

The Advisory Committee discussed that making it more difficult to file under seal could prove troublesome in litigation with highly confidential, technical, and competitive information. The attorney members stressed the variation across districts. There were also suggestions to consult with clerks' offices since they are essential to the day-to-day handling of these issues.

Professor Marcus observed that the aspect of the draft proposal that emphasizes that existing Rule 26(c) does itself not authorize filing under seal had been discussed in previous years. He suggested that the Standing Committee's input would be particularly useful on the further sketches presented in the agenda book at pages 300-03 concerning procedures for handling motions to seal. Such procedural questions include (1) whether the motion to seal must be filed openly, (2) whether materials can be filed under a tentative or preliminary seal to meet deadlines, (3) whether the party seeking to file under seal needs to give notice to anyone with a confidentiality interest, (4) what happens if the motion to seal is not granted, (5) when the seal will be removed, (6) whether a member of the public can intervene to seek to unseal sealed materials, and (7) whether a party can retrieve its sealed materials from the court's file after termination of the action (and how such a retrieval would affect the record in the event of an appeal).

A practitioner member commented that this is a complicated topic. While a lot of cases have confidential information, there is a lot of over-designation, and if parties are persistent about sealing, it can come down to how much the other party or the court wants to push back. Certain kinds of cases may also present various First Amendment issues, which should not be defined by rule. The member wondered whether the rule should set a floor while the Committee Note could recognize that First Amendment or other concerns could lead the court to be more aggressive in policing sealing.

A judge member emphasized the great inconsistency in case law as to the difference between protective orders and sealing orders. She also noted that district courts will likely apply a different standard in criminal cases (for example, as to plea and sentencing issues) than they do in civil cases. There is a need for guidance concerning what a court ought to consider when thinking about a sealing order and whether it should be different in civil and criminal cases. She added that it can be a significant technical challenge for the clerk's office when a party requests for only part of a large filing to be sealed.

Alluding to the work (more than a decade previously) of the Standing Committee's Privacy Subcommittee, Professor Marcus recalled that there had been considerable concern over access to information in presentence reports; but this, he observed, is not the Civil Rules Committee's focus. The sketch also was not intended to alter the scope of First Amendment and common law rights to access court documents.

Another judge member commented that the motion should tell the court why the records need to be sealed. It would not be possible to set a hard-and-fast rule governing whether the motion to seal can itself be filed under seal. There should be no taking back of documents once filed on CM/ECF. If a motion is denied, the party can refile it in a manner consistent with what the court ordered. Otherwise, the material should remain inaccessible and effectively under seal but not able to be used in the case. That preserves the record for appeal. Professor Marcus asked if the bracketed language in the sketch that says "unless the court orders otherwise" (page 300, line 409 in the agenda book) would work. The judge member agreed that would make sense and the party can request that it be filed under seal and give a reason why.

Judge Bates observed that this is a very complex, large project for the Advisory Committee and its subcommittee. It is also a fairly difficult area because any rule would have tremendous

effects on the various districts and their local rules. Because of the inconsistency, it would require revision of local rules, as well.

*Cross-border discovery.* Judge Rosenberg and Professor Marcus reported that consideration of cross-border discovery is in the very early stages. The proposal comes from Judge Michael Baylson, who presented at the Advisory Committee’s October meeting. He and Professor Gensler have prepared an article published in *Judicature* entitled “Should the Federal Rules Be Amended to Address Cross-Border Discovery?” They propose that the Advisory Committee should consider how the Civil Rules could better guide judges and attorneys in cases involving foreign discovery. The Sedona Conference submitted a letter in support.

The Advisory Committee recognized that this will be a major undertaking but felt it is worth pursuing. This topic may not be limited to discovery and evidence gathering and could implicate Rule 44.1, regarding proof of foreign law, and service of process. A new subcommittee chaired by Judge Manish Shah has been appointed to undertake this project. The first subcommittee meeting will be in January.

When, in the 1980s, the rulemakers sent to the Supreme Court a proposed amendment dealing with discovery for use in U.S. cases, the United Kingdom objected, the Court returned the proposal to the rulemakers, and no further action was taken. Professor Marcus observed that in *Societe Nationale Industrielle Aerospatiale v. U.S. District Court*, 482 U.S. 522 (1987), the Supreme Court refused to require first resort to the Hague Convention procedures for foreign discovery and allowed the federal courts to use the Federal Rules as to the parties before the American court. The proposed rule was criticized as following the view of the dissent in *Aerospatiale* rather than the view of the majority. However, things have changed significantly since the 1980s due to the increase in discovery of digital materials. Professor Marcus noted that, more recently, Judge David Campbell successfully used the Hague Convention procedures in a case before him.

Professor Marcus also observed that a separate statute, 28 U.S.C. § 1782, governs U.S. discovery for use in proceedings abroad. The subcommittee will also consider whether to address that topic.

Professor Marcus asked for suggestions about what to do and who might be an expert on this subject.

A judge member recalled listening to Judge Baylson and Judge Lee Rosenthal discussing this topic. Judge Baylson is very knowledgeable and has dedicated a great deal of considerable thought to it.

Ms. Shapiro noted that the DOJ has a great deal of experience with cross-border discovery and mutual legal assistance requests. It was noted that Joshua Gardner will represent the DOJ on the subcommittee.

**Rule 7.1 Subcommittee.** Judge Rosenberg reported that the subcommittee is considering suggestions from Judge Ralph Erickson and Magistrate Judge Patricia Barksdale, prompted by the concern that the recusal statute potentially covers significantly more situations than the disclosure requirement in Rule 7.1(a). The Rule 7.1 Subcommittee, chaired by Justice Jane N. Bland, was

created in March 2023 to consider whether a rule amendment is needed to better inform judges of the circumstances that might trigger the statutory duty to recuse.

Currently, Rule 7.1(a) provides for disclosure of any parent corporation of a party and any publicly held corporation owning 10% or more of a party's stock. In contrast, the recusal statute, 28 U.S.C. § 455(b)(4), provides that a judge shall recuse when he knows that he, individually or as a fiduciary, or his spouse or his minor child residing in his household, has a financial interest in the subject matter in controversy or in a party to the proceeding. The statute defines "financial interest" as ownership of a legal or equitable interest, however small, or a relationship as director, adviser, or other active participant in the affairs of a party.

To address this potential gap, Judge Erickson suggested requiring disclosure of grandparent corporations. Magistrate Judge Barksdale proposed requiring that parties check all the judge's publicly available financial disclosures and file a notice of any conflict.

The Advisory Committee has also considered the local rules from the 50 district courts that have rules on this subject, which are catalogued in a memorandum from a former Rules Law Clerk. There are a few options being considered.

The Judicial Conference's Codes of Conduct Committee has indicated that the Advisory Committee's consideration of a potential rule amendment would not conflict with its work. There is also relevant pending legislation, the Judicial Ethics and Anti-Corruption Act of 2023, which would bar a justice or judge from owning any interest in any security, trust, commercial real estate, or privately held company, with exceptions for mutual funds and government (or government-managed) securities.

The subcommittee plans to meet before the full Advisory Committee meeting in April with the goal of presenting a proposed amendment, if any is deemed necessary, at the April meeting.

Professor Bradt explained that the drafting challenge—and where Standing Committee feedback would be helpful—is in figuring out language to sufficiently capture the full range of circumstances in which a judge might be required to recuse without making the disclosure requirement unduly burdensome. One problem with only requiring disclosure of a parent corporation is that there might still be a grandparent company or other related entity giving the judge a financial interest.

There have also been concerns that it would be difficult for a rule to capture the everchanging landscape of financial instruments and business associations. Local rules have taken a wide variety of approaches. Some local rules expand the general categories of entities to be disclosed beyond those in Rule 7.1(a), using words like "affiliation" or "entity." Others require disclosure of defined financial relationships, like an insurer or third-party litigation funder. Another option is to require disclosure of entities owning a percentage of stock smaller than 10%. The 10% ownership threshold in the current rule is thought to serve as a proxy for control. A lower percentage might better capture the financial interest requirement of the recusal statute.

Judge Bates observed that, while there was no feedback from the Standing Committee right now, there is more work to do, and that may engender some feedback in the future.



**Random Case Assignment.** Judge Rosenberg and Professor Bradt reported on this item. The Advisory Committee decided at the October meeting to accept the random assignment of cases as a project to explore. Attention on this issue has increased due to concerns that in high-profile cases, especially cases seeking nationwide injunctions against executive action, plaintiffs are engaged in a form of forum shopping, particularly in single-judge divisions of district courts.

The Brennan Center for Justice submitted a proposal urging the adoption of a rule to require the randomization of judicial assignment within districts for certain civil cases. Others have also expressed interest in this topic. In July 2023, nineteen United States senators sent a letter to Judge Rosenberg. The following month, the American Bar Association (ABA) adopted a resolution urging federal courts to implement district-wide random case assignment. The House and Senate Judiciary Committees have also held hearings on issues related to nationwide injunctions and forum shopping.

Judge Rosenberg noted that there are questions about whether a national rule can require reallocation of business among divisions of a district court or whether, under 28 U.S.C. § 137, such questions are beyond the scope of rulemaking. Since the October meeting, Professor Bradt has been researching the threshold consideration of whether this is an area for potential rulemaking.

Professor Bradt set out a sequence of relevant questions to consider. First, would a rule on this topic be a general rule of practice and procedure such that it falls within the Rules Enabling Act (REA)'s grant of rulemaking authority? Second, if so, should the supersession clause of the REA be invoked to override the provision in Section 137 giving districts local control over the division of their business? There are also statutory provisions governing the structure of district courts, including divisions, and, for prudential reasons, the Advisory Committee has avoided rulemaking in this area. There are further prudential questions of whether the Advisory Committee ought to act and, if so, what a rule might look like.

In tailoring any potential rule, it would be necessary to define the problem they would be seeking to solve. That is, in which kinds of cases should a rule impose a random case assignment requirement? The Brennan Center submission suggested that a rule should encompass any case in which a party seeks injunctive relief that may have an effect outside the district. The ABA suggested any case in which the United States is a party. Various local rules identify particular subject matters of cases.

Professor Bradt requested feedback from the Standing Committee about whether this is an appropriate subject for rulemaking.

Judge Bates commented that this is obviously an issue of great importance to the Judiciary. These initial issues of authority and prudential considerations of whether this is something that should be addressed through the rules process are very important and need to be thought about at the outset.

A judge member noted that there might be some benefit to working on this issue, even if it turns out not to be within the scope of authority of the Rules Committees. There might be a future legislative proposal on this topic at some point, and it would be nice to have had a committee like

this advance its thinking so that the Judiciary might be able to make suggestions to Congress. A practitioner member agreed. There is a need for objective analysis of what might be done. Although a little out of order, coming up with some ideas of what a solution might be, even if we ultimately do not act, could contribute to informing other actors who might be more able to do something directly. Judge Bates agreed that it can be illuminating to other possible actors that the Rules Committees are looking seriously at an issue and that they have some ideas as to how it can be approached.

Ms. Shapiro noted that the DOJ sent the Advisory Committee a letter in December formally taking the position that rulemaking on this subject is within the grant of authority in the REA. Judge Rosenberg commented that the DOJ's extensive and helpful letter came in after the agenda book materials were put together. Judge Bates agreed the letter was comprehensive and thoroughly addressed the authority question although it did not address the important prudential issues as much.

Professor Hartnett flagged a terminology issue. Although commentators often use the term "nationwide injunction," the problem is not an injunction's geographic scope. An injunction in a patent case barring one party from infringing the other's patent standardly does apply outside the district of the court that entered the injunction. The concern is that the injunction reaches beyond the parties. Using the terminology of "nonparty" injunction is more accurate and reduces the risk of a rule that does not address the real problem.

Another practitioner member echoed Professor Hartnett's observation that it is important to think carefully about the problem the Advisory Committee might target. But "nonparty" does not solve the issue of forum shopping to enjoin the United States.

Professor Hartnett clarified that the problem with injunctions against the United States arises when the injunction is read not only to enjoin the United States with regard to a particular plaintiff, but also with respect to nonparties.

Professor Coquillette commented that the prudential consideration is central. When Congress gets involved by making a rule directly, style and consistency can suffer, so it is a fundamental principle that the Rules Committees should be cautious about issues that Congress is considering.

***Demands for Jury Trials in Removed Actions.*** Judge Rosenberg and Professor Marcus reported on this item. A 2015 suggestion focused on the 2007 restyling project's change in the tense of a verb in Rule 81(c). When this submission was initially presented to the Standing Committee in 2016, two members of the Standing Committee proposed a change to Rule 38 to change the default rule so that parties need not demand a jury trial. Such a change would have obviated the need to consider the underlying Rule 81(c) suggestion. After considerable research by the FJC, the Advisory Committee decided not to propose a change in Rule 38's default rule on jury demands, and that proposal was removed from the Advisory Committee's agenda. The Advisory Committee will consider the Rule 81(c) suggestion again at its April meeting, but the Standing Committee need not spend time on it right now.

**Other topics.** Judge Rosenberg and Professor Marcus reported on a few issues that the Advisory Committee lacked the capacity and resources to consider presently but that remained on its agenda.

The Advisory Committee has paused consideration on a Civil Rule 62(b) suggestion related to notice of premiums for supersedeas bonds. The proposal comes from the Appellate Rules Committee after it published a proposed change to Appellate Rule 39 in response to a Supreme Court decision. This issue is discussed in the agenda book starting on page 316. Judge Bates observed that the Appellate Rules Committee believes there is a possible need for a change to Civil Rule 62 but that the Civil Rules Committee was not as sure. He invited the advisory committees to continue discussing the subject outside the context of this meeting.

Another information item concerned a proposal about attorney's fee awards for Social Security appeals. Professor Marcus noted that the Supplemental Rules for Social Security cases only went into effect about a year ago. Moreover, one district is considering a local rule on this topic. Further experience could inform any later rulemaking efforts; in the meantime, the Advisory Committee does not recommend action on this proposal.

Professor Marcus directed the Committee's attention to the discussion in the agenda book (starting at page 328) of items to be removed from the Advisory Committee's agenda.

Judge Bates thanked Judge Rosenberg and the reporters for the thoroughness of their report on many important subjects.

### **REPORT OF THE ADVISORY COMMITTEE ON CRIMINAL RULES**

Judge Dever and Professors Beale and King presented the report of the Advisory Committee on Criminal Rules, which last met on October 26, 2023, in Minneapolis, Minnesota. The Advisory Committee presented three information items and no action items. The Advisory Committee's report and the draft minutes of its last meeting are included in the agenda book beginning at page 367.

#### *Information Items*

**Rule 17 and pretrial subpoena authority.** Judge Dever reported that Judge Nguyen chairs the subcommittee examining potential changes to Rule 17 concerning subpoenas. There was a conference in October 2022 where the subcommittee gathered information about whether there is a problem with Rule 17, whether there are differences from court to court in the application of Rule 17, and how the *Nixon* standard of relevance, admissibility, and specificity is being applied. It has continued to gather information about this issue from experts and attorneys in industries associated with potentially relevant issues, such as the Stored Communications Act.

The subcommittee is now in the drafting process and has a meeting scheduled in February to discuss specific language. There are some basic principles outlined on page 369 of the agenda book. For example, there needs to be judicial supervision of any subpoena issued because it carries the authority of the court. The rule also needs to distinguish between personal or confidential information and other information. There should also be an option for an ex parte process.

**Rule 23 and government consent to bench trials.** Judge Dever reported on this item. To have a bench trial, Rule 23(a) currently requires a written request from the defendant, the consent of the United States, and the approval of the court. The Federal Criminal Procedure Committee of the American College of Trial Lawyers proposes removing the government from that process when the defendant can provide reasons sufficient to overcome the presumption in favor of a jury trial.

The Advisory Committee had questions about the proposal at its April 2023 meeting and gathered information from the DOJ and the defense community. The Advisory Committee discussed the findings at its meeting in October. The proposal initially suggested there might be a backlog of cases due to the pandemic, but that turned out not to be the case. Only eight of the 94 districts said there was something of a backlog. But any rule change would not happen soon enough to address it. The Advisory Committee also learned that there is not a uniform DOJ policy on whether the government consents to a bench trial, and it varies by United States Attorney. In some districts the United States Attorney's Office always prefers a jury trial.

The Advisory Committee also discussed the leading Supreme court case addressing Rule 23, *Singer v. United States*, 380 U.S. 24 (1965), which recognized that the court could order a bench trial over the government's objection where there were compelling reasons associated with a defendant's need to get a fair trial. There were also a couple of cases that arose during the pandemic in which a court invoked the *Singer* language. The Advisory Committee could not find sufficient space between the *Singer* standard and other reasons that would be sufficient to overcome the presumption in favor of a jury trial.

The Advisory Committee voted overwhelmingly, but not unanimously, to remove this item from its agenda.

Judge Dever explained that the Advisory Committee also discussed the defense bar's concern that defendants were not receiving an acceptance of responsibility credit when they only went to trial to preserve a suppression issue for appeal. It viewed this as a Sentencing Guidelines issue, rather than an issue with the Federal Rules of Criminal Procedure.

Professor Beale recalled that the Advisory Committee discussed notifying the United States Sentencing Commission about this issue, but there was a question about whether such communication should come from the Criminal Rules Committee or the Standing Committee.

Judge Bates remarked that the mechanism of a communication to the Sentencing Commission could be worked out if the Advisory Committee thought it was a good idea and the Standing Committee agreed. The question was whether the Standing Committee agreed that the Sentencing Commission should be informed that the Advisory Committee thought an issue exists with respect to the acceptance of responsibility credit.

Professor Beale noted that some judges already give an acceptance of responsibility credit in this circumstance, but defense counsel reported that they frequently cannot get the credit. The Advisory Committee does not believe there is a uniform practice. But the Advisory Committee did not conduct an in-depth study on the issue and preferred to ask the Sentencing Commission to examine it.

Judge Dever added that U.S.S.G. § 3E1.1 currently gives the judge discretion. It does not say that a defendant who goes to trial cannot get the credit. But in the Commentary to § 3E1.1, the Application Notes do not include an example for giving the defendant credit after going to trial to preserve an issue for appeal. The Advisory Committee was unsure if the Sentencing Commission could amend the Application Notes to add an explicit example of this.

Judge Bates commented that the Advisory Committee's observation was that it would be a good idea to communicate to the Sentencing Commission that this seems to be an issue that might merit some examination, but not to make any specific recommendation.

A judge member asked for clarification on what would be communicated as a good idea. Is it that, if anyone is going to look at this issue, it should be the Sentencing Commission as opposed to the Rules Committees? She noted that judges have a lot of discretion at sentencing, and it is important to present this as an issue for the Sentencing Commission without taking a position.

Another judge member asked if the proposition was to formally communicate a concern.

Judge Bates asked the Advisory Committee to word the proposition.

Professor Beale stated that concerns were raised at the Advisory Committee's meeting about this issue. The Advisory Committee felt it was not a Criminal Rules issue but wanted to communicate those concerns to the Sentencing Commission. The Advisory Committee would take no position on whether the Sentencing Commission should do something. Rather, it would transmit those concerns, saying that the issue is not properly addressed to the Rules Committees.

Judge Dever commented that the Advisory Committee would be happy to send a letter to the Sentencing Commission but that it did not want to get ahead of the Standing Committee.

Judge Bates thought it was important for the Standing Committee to know whether the concern came from the Advisory Committee or only some of its members.

Professor King responded that the concern was raised by several members of the Advisory Committee. At the end of the discussion, Judge Dever asked the Advisory Committee about sending something to the Sentencing Commission. There was committee-wide agreement that the appropriate place to resolve this concern was at the Sentencing Commission and that it was important enough that the Advisory Committee wanted it to be conveyed. At the end of the meeting, Judge Bates and Judge Dever had a conversation about who should do it.

Judge Bates clarified that the communication, which might come from the Standing Committee or the Advisory Committee, would be a factual recitation—namely, that these concerns were raised but the Advisory Committee felt that they were more appropriately addressed to the Sentencing Commission.

A judge member stated that he does not see the role of the Standing Committee as being a clearinghouse of concerns and suggestions. Usually, the Rules Committees do not refer things along. They tell the suggester when they have come to the wrong place. Consequently, when one of the Rules Committees formally refers something to another governmental body, that referral conveys that the committee has a serious concern that should require more attention than it might

have received otherwise. There might be occasions on which the Rules Committees would make such a referral, but they should only do so after employing the same sort of vetting process that they use when making recommendations on rules. There may be other sides to the issue. For example, he suspected some United States Attorneys might have a different perspective than the defense counsel who had voiced concerns.

In light of the last-mentioned comment, Judge Bates asked Ms. Shapiro whether she had any comments to contribute on behalf of the DOJ. She did not. Professor Struve commented that a DOJ representative at the Advisory Committee meeting had observed that this issue might belong with the Sentencing Commission.

Judge Bates commented that they may be making more out of this issue than was needed. In fairness to the Advisory Committee, it was doing the right thing by checking with the Standing Committee. Judge Bates asked if there were any other concerns with the Advisory Committee sending something to the Sentencing Commission indicating the issue had come up and that the view was that it should be referred to the Sentencing Commission for any further exploration.

The judge member with the prior concern cautioned against creating a precedent of the Advisory Committee referring matters even if it includes a referral statement that the committee was not taking any position. But he acknowledged that the disclaimers would ameliorate the concern that a referral would come with a recommendation.

Judge Bates observed that this was a little different from what typically happens when a Rules Committee, possibly through the Rules Committee Staff, coordinates with another Judicial Conference Committee, often CACM. Communications with the Sentencing Commission regarding potential changes to the Guidelines or commentary are more sensitive and require care. But it is not beyond the capacity of the Advisory Committee to take that into account when drafting a letter to the Sentencing Commission.

Judge Bates asked if there were any other concerns about the Advisory Committee taking that sort of modest communication. Aside from the judge member who spoke earlier, there were no objections.

***Rule 53 and broadcasting court proceedings in the cases of United States v. Donald J. Trump.*** Judge Dever reported on this item. Thirty-eight members of Congress asked the Judicial Conference to authorize the broadcasting of court proceedings in the cases of *United States of America v. Donald J. Trump*. The Advisory Committee discussed the lack of Rules Enabling Act authority to promulgate a rule applying to a single defendant and noted that any rule would become effective, at the absolute earliest, in December 2026, which would likely be after a trial in the relevant cases. A coalition of media organizations later submitted a suggestion on this topic more generally, apart from the specific cases against Donald Trump.

In light of this, the Advisory Committee has formed a subcommittee to study whether to propose amendments to Rule 53. The subcommittee anticipates meeting in March, and the Advisory Committee plans to discuss this issue at its April meeting.

Judge Dever added that, for anyone who wanted to get a history of the issues, the AO has a terrific paper on its website titled *History of Cameras, Broadcasting, and Remote Public Access*

*in Courts.* Thirty years ago, the Advisory Committee, in a divided vote, recommended that Rule 53 be amended to permit broadcasting consistent with Judicial Conference policy. At the Standing Committee, the chair cast a tie-breaking vote, and the proposal went to the Judicial Conference where it was voted down. Rule 53 has not been substantively amended since it took effect in 1946.

Judge Dever also noted that some cross-committee projects are described in the Criminal Rules Committee's written report in the agenda book. Judge Bates observed that the Criminal Rules Committee was considering some important issues. The Rule 17 issue is a big one, and there is a lot of work yet to be done. There has been a lot going on recently regarding remote proceedings and broadcasting, and it may be the right time to look seriously at Rule 53.

### **REPORT OF THE ADVISORY COMMITTEE ON EVIDENCE RULES**

Judge Schiltz presented the report of the Advisory Committee on Evidence Rules, which last met on October 27, 2023, in Minneapolis, Minnesota. The Advisory Committee presented several information items and no action items. The Advisory Committee's report and the draft minutes of its last meeting are included in the agenda book beginning at page 399.

#### *Information Items*

Judge Schiltz reported that at the last meeting, the Advisory Committee heard from two panels. The first panel, made up of five law professors, was invited to speak on any changes they would make to the Federal Rules of Evidence. A second panel featured two experts in artificial intelligence who educated the Advisory Committee about AI and its implications for litigation and the Evidence Rules. The focus was on deep fakes and the ability of AI to produce convincing, but fake, evidence that is hard to detect and will present a real problem for federal trials.

Following the presentations, the Advisory Committee discussed the suggestions, and decided to pursue three matters.

The first proposal being considered is a potential amendment to Rule 609, which addresses when prior convictions can be brought up to impeach a witness on the stand. The proposal is that only convictions for crimes indicating actual dishonesty or false statement would be admissible to impeach, and other types of convictions would not be admissible. The argument is that other types of convictions are not especially probative of credibility. There is also a high price to a defendant who wants to testify but is worried about the admission of prior convictions for crimes such as attempted murder or child pornography.

The second proposal is for a new Rule 416 governing the admissibility of evidence that a victim of alleged misconduct—most often sexual misconduct—had previously made false accusations of similar misconduct. This proposal came from one of the professors on the first panel, who noted that there is a great deal of confusion in the case law about how to treat evidence that a victim of an alleged crime had made false accusations of similar alleged crimes.

The third proposal is a possible amendment to the hearsay rule. The committee is considering two options with respect to out-of-court statements made by a witness on the stand who is under oath and subject to cross examination. A broad option could say that no such prior statements made by a testifying witness can be excluded as hearsay—although it could still be

excluded under Rule 403. A narrower version could say that no prior *inconsistent* statement of a testifying witness can be excluded under the hearsay rule. Today, a prior inconsistent statement can be introduced for its truth only if made under oath at a prior proceeding, which is rare.

The Advisory Committee also plans to hold a conference to further its study of AI and machine-based evidence. The issues, including authentication, hearsay, and expert testimony, are incredibly complicated, and AI technology is changing quickly. The committee's initial focus will likely be on issues of authenticity.

Judge Bates observed that the Chief Justice has focused on AI as an important issue for the Judiciary. These are very difficult issues that the Advisory Committee is considering. In some regards, the difficulty lies in understanding the issues. As to Rule 609, any change in that Rule will be controversial. He thanked Judge Schiltz for the report and the committee's continuing efforts on all those matters.

### **OTHER COMMITTEE BUSINESS**

The Rules Law Clerk provided a legislative update. The legislation tracking chart begins on page 416 of the agenda book. Since the agenda book was published in December, the National Guard and Reservists Debt Relief Extension Act of 2023 became law, meaning that Interim Bankruptcy Rule 1007-I will continue to apply for at least another four years.

#### *Action Item*

***Judiciary Strategic Planning.*** This was the last item on the meeting's agenda. Judge Bates asked the Standing Committee to authorize him to work with Rules Committee Staff to respond to the Judicial Conference regarding strategic planning. Without objection, the Standing Committee authorized Judge Bates to work with Rules Committee Staff to submit a response regarding Strategic Planning on behalf of the Standing Committee.

### **CONCLUDING REMARKS**

Judge Bates thanked the Standing Committee members and other attendees. The Standing Committee will next convene on June 4, 2024, in Washington, D.C.



**TAB 2B2**

**SUMMARY OF THE**  
**REPORT OF THE JUDICIAL CONFERENCE**  
**COMMITTEE ON RULES OF PRACTICE AND PROCEDURE**

This report is submitted for the record and includes the following items for the information of the Judicial Conference:

- Federal Rules of Appellate Procedure ..... pp. 2-3
- Federal Rules of Bankruptcy Procedure ..... pp. 3-4
- Federal Rules of Civil Procedure..... pp. 4-5
- Federal Rules of Criminal Procedure..... pp. 5-6
- Federal Rules of Evidence .....p. 7
- Judiciary Strategic Planning ..... pp. 7-8

<p><b>NOTICE</b> NO RECOMMENDATIONS PRESENTED HEREIN REPRESENT THE POLICY OF THE JUDICIAL CONFERENCE UNLESS APPROVED BY THE CONFERENCE ITSELF.</p>
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**REPORT OF THE JUDICIAL CONFERENCE**

**COMMITTEE ON RULES OF PRACTICE AND PROCEDURE**

**TO THE CHIEF JUSTICE OF THE UNITED STATES AND MEMBERS OF THE  
JUDICIAL CONFERENCE OF THE UNITED STATES:**

The Committee on Rules of Practice and Procedure (Standing Committee or Committee) met on January 4, 2024. All members participated.

Representing the advisory committees were Judge Jay S. Bybee, chair, and Professor Edward Hartnett, Reporter, Advisory Committee on Appellate Rules; Judge Rebecca Buehler Connelly, chair, Professor S. Elizabeth Gibson, Reporter, and Professor Laura B. Bartell, Associate Reporter, Advisory Committee on Bankruptcy Rules; Judge Robin L. Rosenberg, chair, Professor Richard L. Marcus, Reporter, Professor Andrew Bradt, Associate Reporter, and Professor Edward Cooper, consultant, Advisory Committee on Civil Rules; Judge James C. Dever III, chair, Professor Sara Sun Beale, Reporter, and Professor Nancy J. King, Associate Reporter, Advisory Committee on Criminal Rules; and Judge Patrick J. Schiltz, chair, Advisory Committee on Evidence Rules.

Also participating in the meeting were Professor Catherine T. Struve, the Standing Committee's Reporter; Professor Daniel R. Coquillette, Professor Bryan A. Garner, and Professor Joseph Kimble, consultants to the Standing Committee; H. Thomas Byron III, the Standing Committee's Secretary; Allison A. Bruff, Bridget M. Healy, and Scott Myers, Rules Committee Staff Counsel; Zachary T. Hawari, Law Clerk to the Standing Committee; John S. Cooke, Director, and Dr. Tim Reagan, Senior Research Associate, Federal Judicial Center; and

<p><b>NOTICE</b> NO RECOMMENDATIONS PRESENTED HEREIN REPRESENT THE POLICY OF THE JUDICIAL CONFERENCE UNLESS APPROVED BY THE CONFERENCE ITSELF.</p>
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Elizabeth J. Shapiro, Deputy Director, Federal Programs Branch, Civil Division, Department of Justice, on behalf of Deputy Attorney General Lisa O. Monaco.

In addition to its general business, including a review of the status of pending rule amendments in different stages of the Rules Enabling Act process and pending legislation affecting the rules, the Standing Committee received and responded to reports from the five advisory committees. The Committee also received an update on the coordinated work among the Appellate, Bankruptcy, Civil, and Criminal Rules Committees to consider two suggestions affecting all four Advisory Committees—suggestions to allow expanded access to electronic filing by pro se litigants and to modify the presumptive deadlines for electronic filing. (The Advisory Committees had removed the latter suggestion from their agendas, and the Committee approved the disbanding of the joint subcommittee that had been formed to consider it.) Additionally, the Committee received a report from a joint subcommittee (composed of representatives from the Bankruptcy, Civil, and Criminal Rules Committees) concerning a suggestion to adopt nationwide rules governing admission to practice before the U.S. district courts. The Standing Committee also heard a report concerning coordinated efforts by several advisory committees concerning a suggestion to require complete redaction of social security numbers and an update from its Secretary on the 2024 report to Congress on the adequacy of the privacy rules.

## **FEDERAL RULES OF APPELLATE PROCEDURE**

### ***Information Items***

The Advisory Committee met on October 19, 2023. The Advisory Committee discussed several issues, including possible amendments to Rule 29 (Brief of An Amicus Curiae) and Appellate Form 4 (Affidavit Accompanying Motion for Permission to Appeal In Forma Pauperis). In addition, the Advisory Committee considered suggestions regarding intervention

on appeal and the redaction of social security numbers in court filings. The Advisory Committee removed from its agenda suggestions regarding the record in agency cases and regarding filing deadlines.

## **FEDERAL RULES OF BANKRUPTCY PROCEDURE**

### ***Rules and Form Approved for Publication and Comment***

The Advisory Committee on Bankruptcy Rules submitted proposed amendments to Rule 1007(h) (Interests in Property Acquired or Arising After a Petition Is Filed), Rule 3018 (Chapter 9 or 11—Accepting or Rejecting a Plan), and Official Form 410S1 (Notice of Mortgage Payment Change) with a recommendation that they be published for public comment in August 2024. The Standing Committee unanimously approved the Advisory Committee’s recommendation.

#### Rule 1007(h) (Interests in Property Acquired or Arising After a Petition Is Filed)

The proposed amendment to Subdivision (h) would clarify that a court may require an individual chapter 11 debtor or a chapter 12 or chapter 13 debtor to file a supplemental schedule to report property or income that comes into the estate post-petition under § 1115, 1207, or 1306.

#### Rule 3018(c) (Form for Accepting or Rejecting a Plan; Procedure When More Than One Plan Is Filed)

Subdivision (c) would be amended to provide more flexibility in how a creditor or equity security holder may indicate acceptance, or a change or withdrawal of a rejection, of a plan in a chapter 9 or chapter 11 case. In addition to allowing acceptance by written ballot, the amended rule would also authorize a court to permit a creditor or equity security holder to accept a plan (or change or withdraw its rejection of the plan) by means of its attorney’s or authorized agent’s statement on the record, including by stipulation or by oral representation at the confirmation hearing. A conforming change would be made to subdivision (a)(3) (“Changing or Withdrawing an Acceptance or Rejection”).

Official Form 410S1 (Notice of Mortgage Payment Change)

The amended form would provide space for an annual Home Equity Line of Credit notice.

***Information Items***

The Advisory Committee met on September 14, 2023. In addition to the recommendation discussed above, the Advisory Committee continued its consideration of a suggestion to require redaction of the entire social security number from filings in bankruptcy and gave preliminary consideration to a suggestion for a new rule addressing a court's decision to allow remote testimony in contested matters in bankruptcy cases.

**FEDERAL RULES OF CIVIL PROCEDURE**

***Information Items***

The Advisory Committee on Civil Rules met on October 17, 2023, and considered several information items. The Advisory Committee continued to discuss Rule 41 (Dismissal of Actions), and in particular whether to amend the rule to address caselaw limiting Rule 41(a) dismissals to dismissals of an entire action. It also discussed the work of the discovery subcommittee, which is considering proposals to amend Rule 45 (Subpoena) and to address filing under seal. The Advisory Committee formed a new subcommittee to study cross-border discovery. The Advisory Committee also heard updates from its subcommittee on Rule 7.1 (Disclosure Statement). The Advisory Committee commenced consideration of suggestions concerning civil case assignment in the district courts.

Other topics discussed by the Advisory Committee include the Bankruptcy Rules Committee's consideration of a suggestion to permit remote testimony in contested matters, a suggestion to amend Rule 62(b) (Stay of Proceedings to Enforce a Judgment), a suggestion to amend Rule 54(d)(2)(B) (Judgment; Costs) with respect to attorney-fee awards in Social Security

cases, and a suggestion to amend Rule 81(c) (Applicability of the Rules in General; Removed Actions) with respect to jury demands in removed cases.

The Advisory Committee also discussed and removed from its agenda suggestions regarding Rule 10 (Form of Pleadings), Rule 11 (Signing Pleadings, Motions, and Other Papers; Representations to the Court; Sanctions), Rule 26(a)(1) (Initial Disclosure), Rule 30(b)(6) (Depositions by Oral Examination), Rule 53 (Masters), and Rule 60(b)(1) (Relief from a Judgment or Order), and a proposed new rule on contempt.

At upcoming hearings, the Civil Rules Committee will hear testimony from many witnesses on the proposed amendments that have been published for public comment—namely, proposed amendments to Rule 16(b)(3) (Pretrial Conferences; Scheduling; Management) and Rule 26(f)(3) (Duty to Disclose; General Provisions Governing Discovery) and proposed new Rule 16.1 (Multidistrict Litigation).

## **FEDERAL RULES OF CRIMINAL PROCEDURE**

### ***Information Items***

The Advisory Committee on Criminal Rules met on October 26, 2023, and considered several information items. The Advisory Committee continues to consider a possible amendment to Rule 17 (Subpoena), prompted by a suggestion from the White Collar Crime Committee of the New York City Bar Association. The Advisory Committee’s Rule 17 subcommittee will develop a draft of a proposed amendment to clarify the rule and to expand the scope of parties’ authority to subpoena material from third parties before trial.

The Committee also considered a recent request from 38 members of Congress to authorize broadcasting of proceedings in the cases of *United States v. Donald J. Trump*. The Committee concluded that it does not have the authority under the Rules Enabling Act to exempt specific cases from Rule 53 (Courtroom Photographing and Broadcasting Prohibited), which

generally prohibits the broadcasting of judicial proceedings from the courtroom in criminal cases. Further, any amendment to Rule 53 to allow exceptions for particular cases—for example, the cases of *United States v. Donald J. Trump*—would not take effect earlier than December 1, 2026, due to the requirements of the rulemaking process set forth by the Rules Enabling Act and Judicial Conference Procedures. The Committee received a later suggestion from a media coalition to amend Rule 53 to permit broadcasting of criminal proceedings. Given the timing of its receipt, the proposal was not discussed by the Committee at its October 2023 meeting, but the chair appointed a subcommittee to consider the proposal going forward.

The Advisory Committee decided to remove from its agenda a proposal submitted by the Federal Criminal Procedure Committee of the American College of Trial Lawyers to amend Rule 23 (Jury or Nonjury Trial) to eliminate the requirement that the government consent to a defendant’s waiver of a jury trial. In order for a bench trial to occur, current Rule 23 requires a written waiver by the defendant of the right to trial by jury, the government’s consent, and the court’s approval. Among a variety of concerns discussed by the Advisory Committee, one relates to a defendant’s ability to obtain credit for acceptance of responsibility under U.S.S.G. § 3E1.1(b) after a jury trial held solely to preserve an antecedent issue for appeal when the government has declined to either accept a conditional plea or consent to a bench trial. Though some members of the Advisory Committee voiced support for clarifying that judges may award acceptance of responsibility in these circumstances, members saw this as a Guidelines issue, not a rules issue. The Advisory Committee expressed support for making the United States Sentencing Commission aware of the concerns expressed by some members of the Committee. After discussion, the Standing Committee (over one member’s objection) determined that the Advisory Committee chair could convey the members’ concerns to the Sentencing Commission.



## **FEDERAL RULES OF EVIDENCE**

### *Information Items*

The Advisory Committee on Evidence Rules met on October 27, 2023. In connection with the meeting, the Advisory Committee held a panel discussion with several Evidence scholars on suggestions for changes to the Evidence Rules, followed by a presentation by experts on artificial intelligence and “deep fakes.” Following the panel discussion and presentation, the Advisory Committee discussed the potential rule amendments raised by the presenters. In particular, the Advisory Committee decided to consider a possible amendment to delete Rule 609(a)(1), which allows admission of felony convictions not involving dishonesty or false statement, and another possible amendment that would add a new Rule 416 to the Evidence Rules to govern the admissibility of evidence of false accusations. In addition, the Advisory Committee will consider a possible amendment to Rule 801(d)(1) (Definitions That Apply to This Article; Exclusions from Hearsay) to provide for broader admissibility of prior statements of testifying witnesses. The Advisory Committee considered but decided not to pursue a possible amendment to Rule 803(4) (Exceptions to the Rule Against Hearsay) that would have narrowed the hearsay exception for statements made for purposes of medical treatment or diagnosis by excluding from that exception statements made to a doctor for purposes of litigation.

### **JUDICIARY STRATEGIC PLANNING**

The Committee was asked to provide recommendations for discussion topics at the next long-range planning meeting scheduled for March 11, 2024 and future long-range planning meetings of Judicial Conference committee chairs. Recommendations on behalf of the

Committee were communicated to Judge Scott Coogler, the judiciary planning coordinator, by letter dated January 11, 2024.

Respectfully submitted,



John D. Bates, Chair

Paul Barbadoro	Lisa O. Monaco
Elizabeth J. Cabraser	Andrew J. Pincus
Louis A. Chaiten	Gene E.K. Pratter
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Edward M. Mansfield	Kosta Stojilkovic
Troy A. McKenzie	Jennifer G. Zipps
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# TAB 2C

**PROPOSED AMENDMENTS TO THE FEDERAL RULES**

**Effective December 1, 2023**

Current Step in REA Process:

- Effective December 1, 2023

REA History:

- Transmitted to Congress (Apr 2023)
- Transmitted to Supreme Court (Oct 2022)
- Approved by Standing Committee (June 2022 unless otherwise noted)
- Published for public comment (Aug 2021 – Feb 2022 unless otherwise noted)

<b>Rule</b>	<b>Summary of Proposal</b>	<b>Related or Coordinated Amendments</b>
AP 2	Proposed amendment developed in response to § 15002(b)(6) of the CARES Act, which directs that the Judicial Conference and the Supreme Court consider rules amendments to address emergency measures that may be taken by the courts when the President declares a national emergency.	BK 9038, CV 87, and CR 62
AP 4	The proposed amendment is designed to make Rule 4 operate with Emergency Civil Rule 6(b)(2) if that rule is ever in effect by adding a reference to Civil Rule 59 in subdivision (a)(4)(A)(vi) of Appellate Rule 4.	CV 87 (Emergency CV 6(b)(2))
AP 26	The technical proposed amendment adds “Juneteenth National Independence Day” to the list of legal holidays.	AP 45, BK 9006, CV 6, CR 45, and CR 56
AP 45	The technical proposed amendment adds “Juneteenth National Independence Day” to the list of legal holidays.	AP 26, BK 9006, CV 6, CR 45, and CR 56
BK 3011	Proposed new subdivision (b) would require courts to provide searchable access to unclaimed funds on local court websites.	
BK 8003 and Official Form 417A	Proposed rule and form amendments are designed to conform to amendments to FRAP 3(c) clarifying that the designation of a particular interlocutory order in a notice of appeal does not prevent the appellate court from reviewing all orders that merged into the judgment, or appealable order or degree.	AP 3
BK 9038 (New)	Proposed new rule developed in response to § 15002(b)(6) of the CARES Act, which directs that the Judicial Conference and the Supreme Court consider rules amendments to address emergency measures that may be taken by the courts when the President declares a national emergency.	AP 2, CV 87, and CR 62
BK 9006(a)(6)(A)	Technical amendment approved by Advisory Committee without publication add Juneteenth National Independence Day to the list of legal holidays.	AP 26, AP 45, CV 6, CR 45, and CR 56
BK Form 410A	Published in August 2022. Approved by the Standing Committee in June 2023. The proposed amendments are to Part 3 (Arrearage as of Date of the Petition) of Official Form 410A and would replace the first line (which currently asks for “Principal & Interest”) with two lines, one for “Principal” and one for “Interest.” The amendments would put the burden on the claim holder to identify the elements of its claim.	

Revised December 7, 2023

**PROPOSED AMENDMENTS TO THE FEDERAL RULES**

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<b>Rule</b>	<b>Summary of Proposal</b>	<b>Related or Coordinated Amendments</b>
CV 6	The technical proposed amendment adds “Juneteenth National Independence Day” to the list of legal holidays.	AP 26, AP 45, BR 9006, CR 45, and CR 56
CV 15	The proposed amendment to Rule 15(a)(1) is intended to remove the possibility for a literal reading of the existing rule to create an unintended gap. A literal reading of “A party may amend its pleading once as a matter of course within ... 21 days after service of a responsive pleading or [pre-answer motion]” would suggest that the Rule 15(a)(1)(B) period does not commence until the service of the responsive pleading or pre-answer motion – with the unintended result that there could be a gap period (beginning on the 22nd day after service of the pleading and extending to service of the responsive pleading or pre-answer motion) within which amendment as of right is not permitted. The proposed amendment would preclude this interpretation by replacing the word “within” with “no later than.”	
CV 72	The proposed amendment would replace the requirement that the magistrate judge’s findings and recommendations be mailed to the parties with a requirement that a copy be served on the parties as provided in Rule 5(b).	
CV 87 (New)	Proposed new rule developed in response to § 15002(b)(6) of the CARES Act, which directs that the Judicial Conference and the Supreme Court consider rules amendments to address emergency measures that may be taken by the courts when the President declares a national emergency.	AP 2, BK 9038, and CR 62
CR 16	The technical proposed amendment corrects a typographical error in the cross reference under (b)(1)(C)(v).	
CR 45	The technical proposed amendment adds “Juneteenth National Independence Day” to the list of legal holidays.	AP 26, AP 45, BR 9006, CV 6, and CR 56
CR 56	The technical proposed amendment adds “Juneteenth National Independence Day” to the list of legal holidays.	AP 26, AP 45, BR 9006, CV 6, and CR 45
CR 62 (New)	Proposed new rule developed in response to § 15002(b)(6) of the CARES Act, which directs that the Judicial Conference and the Supreme Court consider rules amendments to address emergency measures that may be taken by the courts when the President declares a national emergency.	AP 2, BK 9038, and CV 87
EV 106	The proposed amendment would allow a completing statement to be admissible over a hearsay objection and cover unrecorded oral statements.	

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Rule	Summary of Proposal	Related or Coordinated Amendments
EV 615	The proposed amendment limits an exclusion order to the exclusion of witnesses from the courtroom. A new subdivision would provide that the court has discretion to issue further orders to “(1) prohibit disclosure of trial testimony to witnesses who are excluded from the courtroom; and (2) prohibit excluded witnesses from accessing trial testimony.” Finally, the proposed amendment clarifies that the existing provision that allows an entity-party to designate “an officer or employee” to be exempt from exclusion is limited to one officer or employee.	
EV 702	The proposed amendment would amend Rule 702(d) to require the court to find that “the expert’s opinion reflects a reliable application of the principles and methods to the facts of the case.” In addition, the proposed amendment would explicitly add the preponderance of the evidence standard to Rule 702(b)–(d).	

Revised December 7, 2023

**PROPOSED AMENDMENTS TO THE FEDERAL RULES**

**Effective (no earlier than) December 1, 2024**

Current Step in REA Process:

- Transmitted to Supreme Court (Oct 2023)

REA History:

- Approved by Standing Committee (June 2023 unless otherwise noted)
- Published for public comment (Aug 2022 – Feb 2023 unless otherwise noted)

<b>Rule</b>	<b>Summary of Proposal</b>	<b>Related or Coordinated Amendments</b>
AP 32	Conforming proposed amendment to subdivision (g) to reflect the proposed consolidation of Rules 35 and 40.	AP 35, 40
AP 35	The proposed amendment would transfer the contents of the rule to Rule 40 to consolidate the rules for panel rehearings and rehearings en banc together in a single rule.	AP 40
AP 40	The proposed amendments address panel rehearings and rehearings en banc together in a single rule, consolidating what had been separate provisions in Rule 35 (hearing and rehearing en banc) and Rule 40 (panel rehearing). The contents of Rule 35 would be transferred to Rule 40, which is expanded to address both panel rehearing and en banc determination.	AP 35
Appendix: Length Limits	Conforming proposed amendments would reflect the proposed consolidation of Rules 35 and 40 and specify that the limits apply to a petition for initial hearing en banc and any response, if requested by the court.	AP 35, 40
BK 1007(b)(7) and related amendments	The proposed amendment to Rule 1007(b)(7) would require a debtor to submit the course certificate from the debtor education requirement in the Bankruptcy Code. Conforming amendments would be made to the following rules by replacing the word “statement” with “certificate”: Rules 1007(c)(4), 4004(c)(1)(H), 4004(c)(4), 5009(b), 9006(b)(3) and 9006(c)(2).	
BK 7001	The proposed amendment would exempt from the list of adversary proceedings in Rule 7001, “a proceeding by an individual debtor to recover tangible personal property under § 542(a).”	
BK 8023.1 (new)	This would be a new rule on the substitution of parties modeled on FRAP 43. Neither FRAP 43 nor Fed. R. Civ. P. 25 is applicable to parties in bankruptcy appeals to the district court or bankruptcy appellate panel, and this new rule is intended to fill that gap.	AP 43
BK Restyled Rules	The third and final set of current Bankruptcy Rules, consisting of Parts VII-IX, are restyled to provide greater clarity, consistency, and conciseness without changing practice and procedure. The first set of restyled rules (Parts I & II) were published in 2020, and the second set (Parts III-VI) were published in 2021. The full set of restyled rules is expected to go into effect no earlier than December 1, 2024.	
CV 12	The proposed amendment would clarify that a federal statute setting a different time should govern as to the entire rule, not just to subdivision (a).	
EV 107	The proposed amendment was published for public comment as new Rule 611(d), but is now new Rule 107.	EV 1006

Revised December 7, 2023

**PROPOSED AMENDMENTS TO THE FEDERAL RULES**

**Effective (no earlier than) December 1, 2024**

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REA History:

- Approved by Standing Committee (June 2023 unless otherwise noted)
- Published for public comment (Aug 2022 – Feb 2023 unless otherwise noted)

<b>Rule</b>	<b>Summary of Proposal</b>	<b>Related or Coordinated Amendments</b>
EV 613	The proposed amendment would require that, prior to the introduction of extrinsic evidence of a witness’s prior inconsistent statement, the witness receive an opportunity to explain or deny the statement.	
EV 801	The proposed amendment to paragraph (d)(2) would provide that when a party stands in the shoes of a declarant or declarant’s principal, hearsay statements made by the declarant or declarant’s principal are admissible against the party.	
EV 804	The proposed amendment to subparagraph (b)(3)(B) would provide that when assessing whether a statement is supported by corroborating circumstances that clearly indicate its trustworthiness, the court must consider the totality of the circumstances and evidence, if any, corroborating the statement.	
EV 1006	The proposed changes would permit a properly supported summary to be admitted into evidence whether or not the underlying voluminous materials have been admitted. The proposed changes would also clarify that illustrative aids not admitted under Rule 1006 are governed by proposed new Rule 107.	EV 107

Revised December 7, 2023



**PROPOSED AMENDMENTS TO THE FEDERAL RULES**

**Effective (no earlier than) December 1, 2025**

Current Step in REA Process:

- Published for public comment (Aug 2023 – Feb 2024 unless otherwise noted)

REA History:

- Approved for publication by Standing Committee (Jan and June 2023 unless otherwise noted)

Rule	Summary of Proposal	Related or Coordinated Amendments
AP 6	The proposed amendments would address resetting the time to appeal in cases where a district court is exercising original jurisdiction in a bankruptcy case by adding a sentence to Appellate Rule 6(a) to provide that the reference in Rule 4(a)(4)(A) to the time allowed for motions under certain Federal Rules of Civil Procedure must be read as a reference to the time allowed for the equivalent motions under the applicable Federal Rule of Bankruptcy Procedure. In addition, the proposed amendments would make Rule 6(c) largely self-contained rather than relying on Rule 5 and would provide more detail on how parties should handle procedural steps in the court of appeals.	BK 8006
AP 39	The proposed amendments would provide that the allocation of costs by the court of appeals applies to both the costs taxable in the court of appeals and the costs taxable in the district court. In addition, the proposed amendments would provide a clearer procedure that a party should follow if it wants to request that the court of appeals to reconsider the allocation of costs.	
BK 3002.1 and Official Forms 410C13-M1, 410C13-M1R, 410C13-N, 410C13-NR, 410C13-M2, and 410C13-M2R	Previously published in 2001. Like the prior publication, the 2023 republished amendments to the rule are intended to encourage a greater degree of compliance with the rule’s provisions. A proposed midcase assessment of the mortgage status would no longer be mandatory notice process brought by the trustee but can instead be initiated by motion at any time, and more than once, by the debtor or the trustee. A proposed provision for giving only annual notices HELOC changes was also made optional. Also, the proposed end-of-case review procedures were changed in response to comments from a motion to notice procedure. Finally, proposed changes to 3002.1(i), redesignated as 3002.1(j) are meant to clarify the scope of relief that a court may grant if a claimholder fails to provide any of the information required under the rule. Six new Official Forms would implement aspect of the rule.	
BK 8006	The proposed amendment to Rule 8006(g) would clarify that any party to an appeal from a bankruptcy court (not merely the appellant) may request that a court of appeals authorize a direct appeal (if the requirements for such an appeal have otherwise been met). There is no obligation to file such a request if no party wants the court of appeals to authorize a direct appeal.	AP 6
Official Form 410	The proposed amendment would change the last line of Part 1, Box 3 to permit use of the uniform claim identifier for all payments in cases filed under all chapters of the Code, not merely electronic payments in chapter 13 cases. If approved, the amended form would go into effect December 1, 2024.	

Revised December 7, 2023

**PROPOSED AMENDMENTS TO THE FEDERAL RULES**

**Effective (no earlier than) December 1, 2025**

Current Step in REA Process:

- Published for public comment (Aug 2023 – Feb 2024 unless otherwise noted)

REA History:

- Approved for publication by Standing Committee (Jan and June 2023 unless otherwise noted)

<b>Rule</b>	<b>Summary of Proposal</b>	<b>Related or Coordinated Amendments</b>
CV 16	The proposed amendments to Civil Rule 16(b) and 26(f) would address the “privilege log” problem. The proposed amendments would call for development early in the litigation of a method for complying with Civil Rule 26(b)(5)(A)’s requirement that producing parties describe materials withheld on grounds of privilege or as trial-preparation materials.	CV 26
CV 16.1 (new)	The proposed new rule would provide the framework for the initial management of an MDL proceeding by the transferee judge. Proposed new Rule 16.1 would provide a process for an initial MDL management conference, designation of coordinating counsel, submission of an initial MDL conference report, and entry of an initial MDL management order.	
CV 26	The proposed amendments to Civil Rule 16(b) and 26(f) would address the “privilege log” problem. The proposed amendments would call for development early in the litigation of a method for complying with Civil Rule 26(b)(5)(A)’s requirement that producing parties describe materials withheld on grounds of privilege or as trial-preparation materials.	CV 16

Revised December 7, 2023

# TAB 2D

**Legislation That Directly or Effectively Amends the Federal Rules  
118th Congress  
(January 3, 2023–January 3, 2025)**

Ordered by most recent legislative action; most recent first

Name	Sponsors & Cosponsors	Affected Rules	Text and Summary	Legislative Actions Taken
<p><b>A bill to provide remote access to court proceedings for victims of the 1988 Bombing of Pan Am Flight 103 over Lockerbie, Scotland</b></p>	<p><a href="#">H.R. 6714</a> <i>Sponsor:</i> Van Drew (R-NJ)</p> <p><i>Cosponsors:</i> Nadler (D-NY) Smith (R-NJ)</p> <p><a href="#">S. 3250</a> <i>Sponsor:</i> Cornyn (R-TX)</p> <p><i>Cosponsor:</i> Gillibrand (D-NY)</p>	<p>CR 53</p>	<p><b>Most Recent Bill Text:</b> <a href="https://www.congress.gov/118/plaws/publ37/PLAW-118publ37.pdf">https://www.congress.gov/118/plaws/publ37/PLAW-118publ37.pdf</a></p> <p><b>Summary:</b> Provides remote access to criminal proceedings for victims of the 1988 Bombing of Pan Am Flight 103 over Lockerbie, Scotland notwithstanding any provision of the Federal Rules of Criminal Procedure or other law or rule to the contrary.</p>	<ul style="list-style-type: none"> <li>• 1/26/2024: S. 3250 signed by President; became Public Law No. 118-37</li> <li>• 1/18/2024: House passed S. 3250</li> <li>• 12/11/2023: H.R. 6714 introduced; referred to Judiciary Committee</li> <li>• 12/11/2023: S. 3250 received in the House and held at the desk</li> <li>• 12/06/2023: S. 3250 passed in the Senate with an amendment by unanimous consent</li> <li>• 12/06/2023: Senate Judiciary Committee discharged by Unanimous Consent</li> <li>• 11/08/2023: S. 3250 introduced in Senate; referred to Judiciary Committee</li> </ul>
<p><b>National Guard and Reservists Debt Relief Extension Act of 2023</b></p>	<p><a href="#">H.R. 3315</a> <i>Sponsor:</i> Cohen (D-TN)</p> <p><i>Cosponsors:</i> Cline (R-VA) Dean (D-PA) Burchett (R-TN)</p> <p><a href="#">S. 3328</a> <i>Sponsor:</i> Durbin (D-IL)</p> <p><i>Cosponsors:</i> <a href="#">8 bipartisan cosponsors</a></p>	<p>Interim BK Rule 1007-I; Official Form 122A1; Official Form 122A1-Supp.</p>	<p><b>Most Recent Bill Text:</b> <a href="https://www.congress.gov/118/plaws/publ24/PLAW-118publ24.pdf">https://www.congress.gov/118/plaws/publ24/PLAW-118publ24.pdf</a></p> <p><b>Summary:</b> Extends the applicability of Interim Rule 1007-I and existing temporary amendments to Official Form 122A1 and Official Form 122A1-Supp. for four years after December 19, 2023.</p>	<ul style="list-style-type: none"> <li>• 12/19/2023: H.R. 3315 signed by President; became Public Law No 118-24.</li> <li>• 12/14/2023: H.R. 3315 passed Senate without amendment by Unanimous Consent</li> <li>• 12/11/2023: H.R. 3315 passed in the House</li> <li>• 11/29/2023: H.R. 3315 reported by the House Judiciary Committee</li> <li>• 11/15/2023: S. 3328 introduced; referred to Judiciary Committee</li> <li>• 05/15/2023: H.R. 3315 introduced in House; referred to Judiciary Committee</li> </ul>

<p><b>Supreme Court Ethics, Recusal, and Transparency Act of 2023</b></p>	<p><a href="#">H.R. 926</a>  <i>Sponsor:</i>                      Johnson (D-GA)</p> <p><i>Cosponsors:</i>  <a href="#">135 Democratic cosponsors</a></p> <p><a href="#">S. 359</a>  <i>Sponsor:</i>                      Whitehouse (D-RI)</p> <p><i>Cosponsors:</i>  <a href="#">43 Democratic or Democratic-caucusing cosponsors</a></p>	<p>AP, BK, CV, CR</p>	<p><b>Most Recent Bill Text:</b>  <a href="https://www.congress.gov/118/bills/hr926/BILLS-118hr926ih.pdf">https://www.congress.gov/118/bills/hr926/BILLS-118hr926ih.pdf</a>  <a href="https://www.congress.gov/118/bills/s359/BILLS-118s359rs.pdf">https://www.congress.gov/118/bills/s359/BILLS-118s359rs.pdf</a></p> <p><b>Summary:</b>                      Would require the Supreme Court and JCUS to issue and prescribe—through an expedited Rules Enabling Act process— (a) codes of conduct for justices and judges; (b) rules of procedure requiring certain disclosures by parties and amici; and (c) rules of procedure for prohibiting or striking an amicus brief that would result in disqualification of a justice, judge, or magistrate judge.</p>	<ul style="list-style-type: none"> <li>• 09/05/2023: S. 359 placed on Senate Legislative Calendar under General Orders</li> <li>• 07/20/2023: S. 359 reported with an amendment from Senate Judiciary Committee</li> <li>• 02/09/2023: S. 359 introduced in Senate; referred to Judiciary Committee</li> <li>• 02/09/2023: H.R. 926 introduced in House; referred to Judiciary Committee</li> </ul>
<p><b>Government Surveillance Transparency Act of 2023</b></p>	<p><a href="#">H.R. 5331</a>  <i>Sponsor:</i>                      Lieu (D-CA)</p> <p><i>Cosponsor:</i>                      Davidson (R-OH)</p>	<p>CR 41</p>	<p><b>Most Recent Bill Text:</b>  <a href="https://www.congress.gov/118/bills/hr5331/BILLS-118hr5331ih.pdf">https://www.congress.gov/118/bills/hr5331/BILLS-118hr5331ih.pdf</a></p> <p><b>Summary:</b>                      Would amend CR 41(f)(1)(B) by adding that an inventory shall disclose whether the provider disclosed to the government any electronic data not authorized by the court and whether the government searched persons or property without court authorization.</p> <p>Would provide for public access to docket records for certain criminal surveillance orders in accordance with rules promulgated by JCUS.</p>	<ul style="list-style-type: none"> <li>• 09/01/2023: H.R. 5331 introduced in House; referred to Judiciary Committee</li> </ul>
<p><b>Protecting Our Democracy Act</b></p>	<p><a href="#">H.R. 5048</a>  <i>Sponsor:</i>                      Schiff (D-CA)</p> <p><i>Cosponsors:</i>  <a href="#">158 Democratic cosponsors</a></p>	<p>CR 6; CV</p>	<p><b>Most Recent Bill Text:</b>  <a href="https://www.congress.gov/118/bills/hr5048/BILLS-118hr5048ih.pdf">https://www.congress.gov/118/bills/hr5048/BILLS-118hr5048ih.pdf</a></p> <p><b>Summary:</b>                      Would require the Supreme Court and JCUS to prescribe rules—through an expedited Rules Enabling Act process—to ensure the expeditious treatment of a civil action brought to enforce a congressional subpoena.</p> <p>Would preclude any interpretation of CR 6(e) to prohibit disclosure to Congress of certain grand-jury materials related to individuals pardoned by the President.</p>	<ul style="list-style-type: none"> <li>• 07/27/2023: H.R. 5048 introduced in House; referred to Oversight &amp; Accountability, Judiciary, Administration; Budget, Transportation &amp; Infrastructure, Rules, Foreign Affairs, Ways &amp; Means, and Intelligence Committees</li> </ul>

<p><b>Back the Blue Act of 2023</b></p>	<p><a href="#">H.R. 355</a>  <i>Sponsor:</i>                      Bacon (R-NE)</p> <p><i>Cosponsors:</i>  <a href="#">18 Republican cosponsors</a></p> <p><a href="#">H.R. 3079</a>  <i>Sponsor:</i>                      Bacon (R-NE)</p> <p><i>Cosponsors:</i>  <a href="#">20 Republican cosponsors</a></p> <p><a href="#">S. 1569</a>  <i>Sponsor:</i>                      Cornyn (R-TX)</p> <p><i>Cosponsors:</i>  <a href="#">41 Republican cosponsors</a></p>	<p>§ 2254                      Rule 11</p>	<p><b>Most Recent Bill Text:</b>  <a href="https://www.congress.gov/118/bills/hr355/BILLS-118hr355ih.pdf">https://www.congress.gov/118/bills/hr355/BILLS-118hr355ih.pdf</a>  <a href="https://www.congress.gov/118/bills/hr3079/BILLS-118hr3079ih.pdf">https://www.congress.gov/118/bills/hr3079/BILLS-118hr3079ih.pdf</a>  <a href="https://www.congress.gov/118/bills/s1569/BILLS-118s1569is.pdf">https://www.congress.gov/118/bills/s1569/BILLS-118s1569is.pdf</a></p> <p><b>Summary:</b>                      Would amend Rule 11 of the Rules Governing Section 2254 Cases by adding: “Rule 60(b)(6) of the Federal Rules of Civil Procedure shall not apply to a proceeding under these rules in a case that is described in section 2254(j) of title 28, United States Code.”</p>	<ul style="list-style-type: none"> <li>• 05/11/2023: S. 1569 introduced in Senate; referred to Judiciary Committee</li> <li>• 05/05/2023: H.R. 3079 introduced in House; referred to Judiciary Committee</li> <li>• 01/13/2023: H.R. 355 introduced in House; referred to Judiciary Committee</li> </ul>
<p><b>Restoring Artistic Protection (RAP) Act of 2023</b></p>	<p><a href="#">H.R. 2952</a>  <i>Sponsor:</i>                      Johnson (D-GA)</p> <p><i>Cosponsors:</i>  <a href="#">31 Democratic cosponsors</a></p>	<p>EV</p>	<p><b>Most Recent Bill Text:</b>  <a href="https://www.congress.gov/118/bills/hr2952/BILLS-118hr2952ih.pdf">https://www.congress.gov/118/bills/hr2952/BILLS-118hr2952ih.pdf</a></p> <p><b>Summary:</b>                      Would amend the Federal Rules of Evidence by adding a new Rule 416 to limit the admissibility of evidence of a defendant’s creative or artistic expression against such defendant.</p>	<ul style="list-style-type: none"> <li>• 04/27/2023: Introduced in House; referred to Judiciary Committee</li> </ul>
<p><b>Sunshine in the Courtroom Act of 2023</b></p>	<p><a href="#">S. 833</a>  <i>Sponsor:</i>                      Grassley (R-IA)</p> <p><i>Cosponsors:</i>                      Klobuchar (D-MN)                      Durbin (D-IL)                      Blumenthal (D-CT)                      Markey (D-MA)                      Cornyn (R-TX)</p>	<p>CR 53</p>	<p><b>Most Recent Bill Text:</b>  <a href="https://www.congress.gov/118/bills/s833/BILLS-118s833is.pdf">https://www.congress.gov/118/bills/s833/BILLS-118s833is.pdf</a></p> <p><b>Summary:</b>                      Would permit district court cases to be photographed, electronically recorded, broadcast, or televised, notwithstanding any other provision of law, after JCUS promulgates guidelines.</p>	<ul style="list-style-type: none"> <li>• 03/16/2023: Introduced in Senate; referred to Judiciary Committee</li> </ul>

<p><b>Bankruptcy Venue Reform Act</b></p>	<p><a href="#">H.R. 1017</a>  <i>Sponsor:</i>                      Lofgren (D-CA)</p> <p><i>Cosponsor:</i>  <a href="#">7 Democratic &amp; 2 Republican cosponsors</a></p>	<p>BK</p>	<p><b>Most Recent Bill Text:</b>  <a href="https://www.congress.gov/118/bills/hr1017/BILLS-118hr1017ih.pdf">https://www.congress.gov/118/bills/hr1017/BILLS-118hr1017ih.pdf</a></p> <p><b>Summary:</b>                      Would require the Supreme Court to prescribe rules through the Rules Enabling Act process to allow government attorneys to appear and intervene in Title 11 proceedings without charge, and without meeting any requirement under any local court rule relating to attorney appearances or the use of local counsel, before any bankruptcy court, district court, or bankruptcy appellate panel.</p>	<ul style="list-style-type: none"> <li>02/14/2023: Introduced in House; referred to Judiciary Committee</li> </ul>
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**Legislation Requiring Only Technical or Conforming Changes  
 118th Congress  
 (January 3, 2023–January 3, 2025)**

Name	Sponsors & Cosponsors	Affected Rules	Text and Summary	Legislative Actions Taken
<p><b>Election Day Holiday Act of 2024</b></p>	<p><a href="#">H.R. 7329</a>  <i>Sponsor:</i>                      Eshoo (D-CA)</p> <p><i>Cosponsor:</i>  <a href="#">21 Democratic cosponsors</a></p>	<p>AP 26, 45;                      BK 9006;                      CV 6; CR 45, 56</p>	<p><b>Most Recent Bill Text:</b>  <a href="https://www.congress.gov/118/bills/hr7329/BILLS-118hr7329ih.pdf">https://www.congress.gov/118/bills/hr7329/BILLS-118hr7329ih.pdf</a></p> <p><b>Summary:</b>                      Would make Election Day a federal holiday.</p>	<ul style="list-style-type: none"> <li>02/13/2024: Introduced in House; referred to Oversight &amp; Accountability Committee</li> </ul>
<p><b>Indigenous Peoples’ Day Act</b></p>	<p><a href="#">H.R. 5822</a>  <i>Sponsor:</i>                      Torres (D-AL)</p> <p><i>Cosponsors:</i>  <a href="#">86 Democratic cosponsors</a></p>	<p>AP 26, 45;                      BK 9006;                      CV 6; CR 45, 56</p>	<p><b>Most Recent Bill Text:</b>  <a href="https://www.congress.gov/118/bills/hr5822/BILLS-118hr5822ih.pdf">https://www.congress.gov/118/bills/hr5822/BILLS-118hr5822ih.pdf</a></p> <p><b>Summary:</b>                      Would replace the term “Columbus Day” with the term “Indigenous Peoples’ Day” as a legal public holiday.</p>	<ul style="list-style-type: none"> <li>09/28/2023: Introduced in House; referred to Oversight &amp; Accountability Committee</li> </ul>
<p><b>Diwali Day Act</b></p>	<p><a href="#">H.R. 3336</a>  <i>Sponsor:</i>                      Meng (D-NY)</p> <p><i>Cosponsors:</i>  <a href="#">15 Democratic &amp; 1 Republican cosponsors</a></p>	<p>AP 26, 45;                      BK 9006;                      CV 6; CR 45, 56</p>	<p><b>Most Recent Bill Text:</b>  <a href="https://www.congress.gov/118/bills/hr3336/BILLS-118hr3336ih.pdf">https://www.congress.gov/118/bills/hr3336/BILLS-118hr3336ih.pdf</a></p> <p><b>Summary:</b>                      Would make Diwali (a/k/a Deepavali) a federal holiday.</p>	<ul style="list-style-type: none"> <li>05/15/2023: Introduced in House; referred to Oversight &amp; Accountability Committee</li> </ul>

<p><b>September 11 Day of Remembrance Act</b></p>	<p><a href="#"><u>H.R. 2382</u></a>  <i>Sponsor:</i>                      Lawler (R-NY)</p> <p><i>Cosponsors:</i>  <a href="#"><u>4 Democratic &amp; 2 Republican cosponsors</u></a></p> <p><a href="#"><u>S. 1472</u></a>  <i>Sponsor:</i>                      Blackburn (R-TN)</p> <p><i>Cosponsor:</i>                      Wicker (R-MS)</p>	<p>AP 26, 45;                      BK 9006;                      CV 6; CR 45, 56</p>	<p><b>Most Recent Bill Text:</b>  <a href="https://www.congress.gov/118/bills/hr2382/BILLS-118hr2382ih.pdf"><u>https://www.congress.gov/118/bills/hr2382/BILLS-118hr2382ih.pdf</u></a>  <a href="https://www.congress.gov/118/bills/s1472/BILLS-118s1472is.pdf"><u>https://www.congress.gov/118/bills/s1472/BILLS-118s1472is.pdf</u></a></p> <p><b>Summary:</b>                      Would make September 11 Day of Remembrance a federal holiday.</p>	<ul style="list-style-type: none"> <li>• 05/04/2023: S. 1472 introduced in Senate; referred to Judiciary Committee</li> <li>• 03/29/2023: H.R. 2382 introduced in House; referred to Oversight &amp; Accountability Committee</li> </ul>
<p><b>Workers' Memorial Day</b></p>	<p><a href="#"><u>H.R. 3022</u></a>  <i>Sponsor:</i>                      Norcross (D-NJ)</p> <p><i>Cosponsors:</i>  <a href="#"><u>11 Democratic cosponsors</u></a></p>	<p>AP 26, 45;                      BK 9006;                      CV 6; CR 45, 56</p>	<p><b>Most Recent Bill Text:</b>  <a href="https://www.congress.gov/118/bills/hr2382/BILLS-118hr2382ih.pdf"><u>https://www.congress.gov/118/bills/hr2382/BILLS-118hr2382ih.pdf</u></a></p> <p><b>Summary:</b>                      Would make Workers' Memorial Day a federal holiday.</p>	<ul style="list-style-type: none"> <li>• 04/28/2023: Introduced in House; referred to Oversight &amp; Accountability Committee</li> </ul>
<p><b>St. Patrick's Day Act</b></p>	<p><a href="#"><u>H.R. 1625</u></a>  <i>Sponsor:</i>                      Fitzpatrick (R-PA)</p> <p><i>Cosponsor:</i>                      Lawler (R-NY)</p>	<p>AP 26, 45;                      BK 9006;                      CV 6; CR 45, 56</p>	<p><b>Most Recent Bill Text:</b>  <a href="https://www.congress.gov/118/bills/hr1625/BILLS-118hr1625ih.pdf"><u>https://www.congress.gov/118/bills/hr1625/BILLS-118hr1625ih.pdf</u></a></p> <p><b>Summary:</b>                      Would make St. Patrick's Day a federal holiday.</p>	<ul style="list-style-type: none"> <li>• 03/17/2023: Introduced in House; referred to Oversight &amp; Accountability Committee</li> </ul>
<p><b>Lunar New Year Day Act</b></p>	<p><a href="#"><u>H.R. 430</u></a>  <i>Sponsor:</i>                      Meng (D-NY)</p> <p><i>Cosponsors:</i>  <a href="#"><u>58 Democratic cosponsors</u></a></p>	<p>AP 26, 45;                      BK 9006;                      CV 6; CR 45, 56</p>	<p><b>Most Recent Bill Text:</b>  <a href="https://www.congress.gov/118/bills/hr430/BILLS-118hr430ih.pdf"><u>https://www.congress.gov/118/bills/hr430/BILLS-118hr430ih.pdf</u></a></p> <p><b>Summary:</b>                      Would make Lunar New Year Day a federal holiday.</p>	<ul style="list-style-type: none"> <li>• 01/20/2023: Introduced in House; referred to Oversight &amp; Accountability Committee</li> </ul>
<p><b>Rosa Parks Day Act</b></p>	<p><a href="#"><u>H.R. 308</u></a>  <i>Sponsor:</i>                      Sewell (D-AL)</p> <p><i>Cosponsors:</i>  <a href="#"><u>115 Democratic cosponsors</u></a></p>	<p>AP 26, 45;                      BK 9006;                      CV 6; CR 45, 56</p>	<p><b>Most Recent Bill Text:</b>  <a href="https://www.congress.gov/118/bills/hr308/BILLS-118hr308ih.pdf"><u>https://www.congress.gov/118/bills/hr308/BILLS-118hr308ih.pdf</u></a></p> <p><b>Summary:</b>                      Would make Rosa Parks Day a federal holiday.</p>	<ul style="list-style-type: none"> <li>• 01/12/2023: Introduced in House; referred to Oversight &amp; Accountability Committee</li> </ul>



# TAB 3

## Committee Discussion of Morning Presentations

Item 3 will be a Committee discussion of the takeaways from the morning presentations.

# TAB 4

# FORDHAM

## University School of Law

Lincoln Center, 150 West 62nd Street, New York, NY 10023-7485

Daniel J. Capra  
Philip Reed Professor of Law

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Memorandum To: Advisory Committee on Evidence Rules  
From: Daniel J. Capra, Reporter  
Re: Possible Amendment to Provide Broader Admissibility for Prior Statements of Testifying Witnesses  
Date: April 1, 2024

At the last meeting, the Committee preliminarily considered whether Rule 801(d)(1) should be amended to provide for broader admissibility of prior hearsay statements of testifying witnesses. Currently the exemption from hearsay established by Rule 801(d)(1) limits the substantive use of a witness's prior statements to the following: 1) only those prior inconsistent statements that were made under oath at a formal proceeding; 2) prior consistent statements, to the extent that they rehabilitate a witness whose credibility has been attacked; and 3) statements of prior identification.

Here is a hypothetical to frame the discussion: Assume that a witness is testifying in a murder case. If the witness says, "Joe told me that the defendant shot the victim," Joe's out-of-court statement is excluded as hearsay, because the jury is in no position to assess the credibility of Joe. But what if the witness says, "I told Joe that I saw the defendant shoot the victim"? Theoretically that prior statement should not be hearsay, because the declarant's credibility *can* be assessed by the jury --- the declarant is the witness, who can be cross-examined. Yet, under the Federal Rules, that statement *is* hearsay. And while, of course, there are many exceptions to the hearsay rule, the exceptions for prior statements of testifying witnesses (especially prior inconsistent statements) are very narrow.

The sense of the Committee at the last meeting, and of the Reporter, was that it would be too drastic and difficult to overhaul the definition of hearsay in a way that would exclude prior statements of testifying witnesses from that definition. So no amendment to Rule 801(a)-(c) is

being considered. But the Committee did express interest in at least considering expansion of the hearsay exemption provided by Rule 801(d)(1).

This memorandum is divided into five parts. Part One discusses the arguments for and against classifying prior statements of testifying witnesses as hearsay. Part Two discusses the history behind the Federal Rules' treatment of prior inconsistent statements; Part Two also addresses concerns about expanding substantive admissibility of prior inconsistent statements, and discusses different approaches taken in some of the states. Part Three provides the history of the Federal Rules' treatment of prior consistent statements, including the 2014 amendment, and discusses the possibility of further expansion of admissibility of such statements. Part Four briefly discusses prior statements of identification, and considers whether any changes to the existing exemption would be useful. Part Five provides two drafting alternatives for an amendment to Rule 801(d)(1)(A).

At this meeting, the Committee will consider whether to propose an amendment to Rule 801(d)(1)(A) to the Standing Committee, for release for public comment. Other options are to continue to consider the proposal, or to take it off the agenda.

## **I. Should Prior Statements of Testifying Witnesses Be Treated as Hearsay?**

### ***A. Arguments in Favor of Admitting Prior Statements of Witnesses as Substantive Evidence***<sup>1</sup>

Federal Rule 801(c) defines hearsay as a statement that “the declarant does not make while testifying at the current trial or hearing.” Thus an earlier statement of a testifying witness, when offered for its truth, is hearsay. So when the witness says, “I told my cousin that I saw the defendant texting while driving” that is inadmissible to prove that the defendant was texting when driving, unless a hearsay exception can be found.

Many have argued that prior statements of testifying witnesses should not be classified as hearsay. Probably the leading proponent for placing prior statements of testifying witnesses outside the hearsay rule was Professor Edmund Morgan. Morgan's basic argument is that the rule against hearsay stems from a concern that the out-of-court declarant's credibility cannot be assessed by the traditional methods of oath, cross-examination, and view of demeanor. But when the declarant *is* the witness at trial, she *will* be under oath and subject to cross-examination and review of demeanor. Morgan makes this point in his famous article, *Hearsay Dangers and the Application of the Hearsay Concept*.<sup>2</sup>

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<sup>1</sup> This section is altered slightly from the memo on this subject for the last meeting.

<sup>2</sup> 62 Harv. L. Rev. 177, 192-94 (1948).

When the Declarant is also a witness, it is difficult to justify classifying as hearsay evidence of his own prior statements. \* \* \* The courts declare the prior statement to be hearsay because it was not made under oath, subject to the penalty for perjury or to the test of cross-examination. To which the answer might well be: “The declarant as a witness is *now* under oath and now purports to remember and narrate accurately. The adversary can now expose every element that may carry a danger of misleading the trier of fact both in the previous statement and in the present testimony, and the trier can judge whether both the previous declaration and the present testimony are reliable in whole or in part.”

\* \* \*

It is true that when the witness *made* the prior statement, she was not subjected to cross-examination, oath and a view of demeanor at that time. But Morgan argues that the existence of these protections *at the time of trial* should suffice. Morgan observes that if the prior statement is consistent with the in-court testimony, it is being affirmed by the witness “under oath subject to all sanctions and to cross-examination in the presence of the trier who is to value it.” As Morgan notes, a prior consistent statement might be excluded on the grounds that it is cumulative, “but surely the rejection should not be on the ground that the statement involves any danger inherent in hearsay.”

But what if the witness denies having made any statement at all? That should not be a problem, according to Morgan, because the witness “will usually swear that he tried to tell the truth in anything that he may have said.” Thus, cross-examination on that averment will be sufficient to regulate any credibility questions as of the time the statement was made. If on the other hand the witness concedes that he made the statement but now swears that it wasn’t true, the factfinder, viewing the testimony of the person who made both statements, is in a good position to assess which, if either, story represents the truth in light of all the facts. Morgan concludes that “[i]n any of these situations Proponent is not asking Trier to rely upon the credibility of anyone who is not present and subject to all the conditions imposed upon a witness. Adversary has all the protection which oath and cross-examination can give him. Trier is in a position to consider the evidence impartially and to give it no more than its reasonable persuasive effect. Consequently there is no good reason for classifying the evidence as hearsay.”

To this classic argument by Morgan, two further points can be made in support of exempting prior statements of witnesses from the hearsay rule. First, the prior statement is by definition closer in time to the event described, and so is less likely to be impaired by faulty memory or a litigation motive.<sup>3</sup> Second, treating prior statements of testifying witnesses as

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<sup>3</sup> See Comments of Standing Committee on Rules of Practice and Procedure and Advisory Committee on Rules of Evidence, enclosed in the Letter of May 22, 1974, Judge Thomsen to Senator Eastland, Senate Hearings 53, 64–66

substantively admissible would avoid a confusing limiting instruction as to those statements that would be admissible anyway for credibility purposes --- e.g., “the prior inconsistent statement may not be considered as a proof of any fact, but only for its bearing on the credibility of the witness.”<sup>4</sup> Indeed the interest in avoiding difficult-to-follow instructions was the animating reason behind the 2014 amendment to Rule 801(d)(1)(B) that eliminated the distinction between substantive and rehabilitative uses for prior consistent statements.

## ***B. Arguments in Favor of Treating Prior Statements of Witnesses as Hearsay***

The classic argument for treating prior statements of witnesses as hearsay was set forth by Justice Stone of the Minnesota Supreme Court in *State v. Saporen*, 285 N.W. 898, 901 (Minn. 1939). He contended that delayed cross-examination of a statement at trial is simply not the same as cross-examination at the time the statement is made:

The chief merit of cross-examination is not that at some future time it gives the party opponent the right to dissect adverse testimony. Its principal virtue is in its immediate application of the testing process. Its strokes fall while the iron is hot. False testimony is apt to harden and become unyielding to the blows of truth in proportion as the witness has opportunity for reconsideration and influence by the suggestions of others, whose interest may be, and often is, to maintain falsehood rather than truth.

The *Saporen* court’s view of cross-examination at trial as “striking while the iron is hot” is surely overstated. It is not as if an adversary’s witness is speaking extemporaneously and off-the-cuff during direct testimony. Trial testimony is usually prepared in advance and elicited in a formal q and a. For the cross-examiner of a witness at trial, the iron is not really hot. Put another way, the asserted gap in effectiveness between cross-examination about a prior statement and cross-examination of trial testimony is surely not as wide as the *Saporen* court would have it. Furthermore, the court’s contention that “false testimony is likely to harden” is completely inapt when it comes to a prior inconsistent statement. When a witness has made a statement that is different from trial testimony, it is pretty obvious that the prior statement never “hardened.”

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(“The prior statement was made nearer in time to the events, when memory was fresher and intervening influences had not been brought into play.”).

<sup>4</sup> *See*, Morgan, *supra*, at 194: “Furthermore, it must be remembered that the trier of fact is often permitted to hear these prior statements to impeach or rehabilitate the declarant-witness. In such event, of course, the trier will be told that he must not treat the statement as evidence of the truth of the matter stated. But to what practical effect? \* \* \* Do the judges deceive themselves or do they realize that they are indulging in a pious fraud?”

*See also* Steven DeBraccio, *The Case for Expanding Admission of Prior Inconsistent Statements in New York Criminal Trials*, 78 Albany L. Rev. 269, 297 (2014) (“it would be more beneficial to our trial process to simply allow the jurors to consider the evidence as truth and avoid the never-ending discussion of the usefulness of limiting instructions”).

That said, there is certainly dispute in the profession about the effectiveness of delayed cross-examination as compared to cross-examination of trial testimony. Some have argued that delayed cross-examination is particularly ineffective when the witness denies ever having made a statement. How do you cross-examine someone about their perceptions at the time of a prior statement when they deny having made it?

The counterargument is that when the witness denies making the statement, “that’s when the fun begins.”<sup>5</sup> Assuming of course that there is evidence that the witness made the statement, the denial is implausible and suspect. In such cases, there is no reason to exclude the prior statement, because the witness can be cross-examined about that implausibility and suspect motivation. Moreover, a witness should not be allowed to bar admissibility of his prior statement simply by declaring falsely that he never made it. The witness should not have that kind of veto power. Notably, if the trial testimony happens to be in the opponent’s favor, the opponent may well find it easy to get the witness to explain the inconsistency in a way that will assist the opponent.

The Supreme Court has recognized the advantage to the opponent when the witness denies making a prior statement. In *Nelson v. O’Neil*, 402 U.S. 622 (1971), the Court considered whether the production of the hearsay declarant at trial alleviated confrontation concerns when the declarant denied making a prior inconsistent statement.<sup>6</sup> The Court posed the question as “whether cross-examination can be full and effective where the declarant is present at the trial, takes the witness stand, testifies fully as to his activities during the period described in his alleged out-of-court statement, but denies that he made the inconsistent statement and claims that its substance is false.” The *Nelson* Court found no error in admitting the hearsay statement as substantive evidence against the defendant. The Court noted that the declarant’s denial of the statement “was more favorable to the respondent than any that cross-examination by counsel could possibly have produced, had [the declarant] affirmed the statement as his.” In sum, the better argument appears to be that the witness’s denial of a prior inconsistent statement is no reason to exclude that statement.

The second argument in favor of excluding prior witness statements as hearsay focuses on prior *consistent* statements. If all prior statements were admissible for their truth, there would be an incentive for parties to encourage their witnesses to generate consistent statements before trial. Then the witness, on direct examination, could be asked about all the previous statements that he made --- to his grandmother, to the church congregation, to the bus driver on the way to testify,

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<sup>5</sup> Thanks to John Siffert for that bon mot at the last meeting.

<sup>6</sup> *Nelson* was decided in the context of a claim that the defendant was denied his constitutional right to confront the declarant, but the constitutional issue presented by admitting hearsay against a criminal defendant is not different conceptually from whether hearsay should be admitted under a hearsay exception.



etc. etc. The focus would then be shifted, problematically, to the prior statements as opposed to the in-court testimony.<sup>7</sup>

There are several counter-arguments responding to the concern about manufactured consistent statements. First, you don't need an overbroad hearsay rule to regulate that problem, because litigation-generated extrinsic statements can be excluded under Rule 403 as cumulative and unduly prejudicial and time-wasting. (The corresponding response to the Rule 403 argument is that the rule is highly discretionary and only operates to exclude evidence where its probative value is *substantially* outweighed by the risk of prejudice, confusion, and delay.) Second, and probably most important, this concern about overuse of consistent statements should not lead to a rule that *all* prior statements are excluded; there is no risk of witnesses manufacturing *inconsistent* statements, and so the concern about generating evidence is localized and should be addressed to prior consistent statements only.

There is a third argument against admitting prior witness statements in criminal cases that can be dismissed. That argument is that admitting a prior statement of a witness against a criminal defendant violates his right to confrontation. The Supreme Court has rejected that argument in several cases, finding that an opportunity to cross-examine the witness about his prior statement satisfies the Confrontation Clause.<sup>8</sup>

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In sum, there is much to be said in favor of a rule that exempts prior witness statements from the hearsay rule. At the very least, there is a strong case for broader admissibility of prior inconsistent statements. It is notable that several states admit *all* prior statements of witnesses for their truth. For example, Kansas (K.S.A. 60-460) states its hearsay rule and then provides an exception for all prior statements of testifying witnesses:

**60-460. Hearsay evidence excluded; exceptions**

Evidence of a statement which is made other than by a witness while testifying at the hearing, offered to prove the truth of the matter stated, is hearsay evidence and inadmissible except:

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<sup>7</sup> See *State v. Saporen*, 285 N.W. 898, 901 (Minn. 1939) (noting the “practical reason” for treating prior witness statements as hearsay --- that it would create temptation and opportunity to manufacture evidence).

<sup>8</sup> See *California v. Green*, 399 U.S. 149 (1970) (rejecting confrontation claim where the defendant had an opportunity to cross-examine a prosecution witness about the witness's prior statement); *United States v. Owens*, 484 U.S. 554 (1988) (no confrontation violation where witness was subject to cross-examination about his prior statement of identification, even though he had no memory about why he made the identification); *Crawford v. Washington*, 541 U.S. 36, 59, n.9 (2004) (“Finally, we reiterate that, when the declarant appears for cross-examination at trial, the Confrontation Clause places no constraints at all on the use of his prior testimonial statements. \* \* \* The clause does not bar admission of a statement so long as the declarant is present at trial to defend or explain it.”) (citing *Green*).

(a) *Previous statements of persons present.* A statement previously made by a person who is present at the hearing and available for cross-examination with respect to the statement and its subject matter, provided the statement would be admissible if made by the declarant while testifying as a witness.

\* \* \*

Similarly, Puerto Rico provides substantive admissibility for *all* prior statements of witnesses, in a hearsay exception:

**Rule 63. Prior statement by witness.** As an exception to the hearsay rule, a prior statement made by a witness who appears at a trial or hearing and who is subject to cross-examination as to the prior statement is admissible, provided that such statement is admissible if made by the declarant appearing as witness.

Delaware has a similar provision. 11 Del. Code § 3507 provides that any voluntary prior statement of a testifying witness “may be used as affirmative evidence with substantive independent testimonial value” and the party need not show surprise.

There is nothing to indicate that the sky has fallen or that advocacy has been impaired as a result of more liberal admissibility in these jurisdictions. Notably, though, no American jurisdiction has altered the *definition* of hearsay to exempt prior statements of testifying witnesses. That is difficult to do as a drafting matter, and if the exception is sufficiently broad, you reach the same result without having to toy with the iconic hearsay definition.

## I. Prior Inconsistent Statements

### *A. How Did We Get Here?: The History of Federal Rule 801(d)(1)(A)*

The common-law approach to prior inconsistent statements was that they were hearsay and were admissible only to impeach the declarant-witness. The original Advisory Committee thought that the common-law rule, distinguishing between impeachment and substantive use of prior inconsistent statements, was “troublesome.”<sup>9</sup> It noted that the major concern of the hearsay rule is that an out-of-court statement could not be tested for reliability because the person who made the statement could not be cross-examined about it. But with prior inconsistent statements, “[t]he

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<sup>9</sup> Advisory Committee Note to Rule 801(d)(1)(A). Note that the Advisory Committee Note to Rule 801(d)(1)(A) describes and supports a hearsay exception that does not exist. As discussed below, Congress basically rejected the Advisory Committee’s position. See Capra, *Advisory Committee Notes to the Federal Rules of Evidence That May Require Clarification*, 182 F.R.D. 268 (1998).

declarant is in court and may be examined and cross-examined in regard to his statements and their subject matter.” And the Committee thought that it had “never been satisfactorily explained why cross-examination cannot be subsequently conducted with success.” Moreover, “[t]he trier of fact has the declarant before it and can observe his demeanor and the nature of his testimony as he denies or tries to explain away the inconsistency.” Finally, “the inconsistent statement is more likely to be true than the testimony of the witness at the trial because it was made nearer in time to the matter to which it relates and is less likely to be influenced by the controversy that gave rise to the litigation.”<sup>10</sup>

For all these reasons, the Advisory Committee’s proposed Rule 801(d)(1)(A) would have exempted all prior inconsistent statements of testifying witnesses from the hearsay rule. The Advisory Committee’s Note to the proposal makes this clear: “Prior inconsistent statements traditionally have been admissible to impeach but not as substantive evidence. Under the rule they are substantive evidence.”

Congress, however, cut back significantly on the Advisory Committee proposal. In the form ultimately adopted, Rule 801(d)(1)(A) states that only those prior inconsistent statements “given under oath subject to the penalty of perjury at a trial, hearing, or other proceeding, or in a deposition” are admissible as substantive evidence. The rationales for this limitation, as expressed by the House Committee on the Judiciary, are that: 1) if the statement was given under oath at a formal proceeding, “there can be no dispute as to whether the prior statement was made”; and 2) the requirements of oath and formality of proceeding “provide firm additional assurances of the reliability of the prior statement.”<sup>11</sup>

There are problems with each of the rationales for Congress’s tightening of the hearsay exception for prior inconsistent statements. The first Congressional concern --- that the statement may never have been made --- is not a hearsay concern. Whether the statement was made (as distinguished from whether it is true) is a question ordinarily addressed by in-court regulators--the in-court witness to the statement testifies and is cross-examined, or other admissible evidence is presented that the statement was or was not made, and this becomes a jury question.<sup>12</sup> Really, Congress’s argument proves too much, because admitting *any* unrecorded out-of-court statement raises the question of whether it was ever made. Why do we find the in-court witness’s testimony that the statement was made in all other situations sufficient, but question in-court testimony (from

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<sup>10</sup> Id.

<sup>11</sup> House Comm. on Judiciary, Fed. Rules of Evidence, H.R.Rep. No. 650, 93d Cong., 1<sup>st</sup> Sess. p. 13.

<sup>12</sup> Of course the inconsistent statement could be proven up through hearsay subject to an exception, such as a business or public record. The point is that concerns about whether the statement was ever made are not a reason, under the hearsay rule, to exclude the statement itself.

the declarant-witness or from someone else with knowledge) when it comes to prior inconsistent statements?<sup>13</sup>

It is likely, though, that the Congressional concern about the statement having been made was really about the purported difficulty of cross-examining witnesses who deny making a prior inconsistent statement, as discussed above. That risk is eliminated because the statement must have been recorded at a formal proceeding --- it's hard to deny such a statement having been made. But as stated above, impeachment of a witness who denies making a statement can be effective; and at any rate the formality requirement is overkill because there can be many ways to prove an informal prior statement even though the witness denies making it --- such as through witnesses, or if it was recorded.

The requirements of oath and formality surely do add reliable circumstances, and thus these requirements do respond to a hearsay concern. But the fact is that the witness is now under oath at trial, subject to cross-examination. That should be a sufficient guarantee of reliability, and adding the oath and formality requirements raise the admissibility hurdle for prior inconsistent statements much higher than for most of the other hearsay exceptions. The Advisory Committee's point is that delayed cross-examination and oath are sufficient to guarantee that the factfinder can properly assess trustworthiness. The point is not that the prior statement is trustworthy. The point is that lack trustworthiness can be determined at trial because the declarant is testifying. And Congress simply missed that point.

The end result of this Congressional intervention is to render the hearsay exception for prior inconsistent statements relatively useless. It goes without saying that the vast majority of prior inconsistent statements are not made under oath at a formal proceeding. Essentially the major function for Rule 801(d)(1)(A) is to protect the proponent (almost always the government in a criminal case) from having its substantive case sapped by turncoat witnesses, when such witnesses have testified before the grand jury and then change their testimony at trial.<sup>14</sup> Congress's rationales for adding the oath and formality requirements are simply not strong enough to justify gutting the exception proposed by the Advisory Committee. This is especially so because the limitation comes with significant negative consequences, including the following:

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<sup>13</sup> Even if the concern about manufactured prior statements were legitimate, it would not need to be regulated by the requirements of oath at a formal proceeding. A less onerous requirement, such as that the statement was recorded, should surely suffice.

<sup>14</sup> At an Advisory Committee Symposium in 2016, a U.S. Attorney stated that pretty much the only use of Rule 801(d)(1)(A) was to deal with "wobblers" --- who say one thing one week, and another thing the next. He stated that you catch them in the week where they are saying the defendant did it, and bring them before the grand jury, thereby boxing up the testimony so that you don't have to worry about a later wobble. Notably, no other party in the system has the ability to control wobblers in that way. Certainly not the accused.

1) excluding testimony as hearsay even though the declarant can be cross-examined;

2) requiring a difficult-to-follow jury instruction, i.e., that the statement can be used only to impeach the witness but not for its truth --- even though in many cases its impeachment value is dependent on it being true; and

3) raising the possibility that parties will seek to evade the rule by calling witnesses to “impeach” them with prior inconsistent statements, with the hope that the jury will use the statements as proof of the matter asserted. That will require the courts to investigate and determine the motivation of the proponent for calling the witness (motivation that would be irrelevant if the prior statement were substantively admissible).<sup>15</sup>

## ***B. Some Concerns Expressed About Expanding Substantive Admissibility of Prior Inconsistent Statements***

At least as a matter of hearsay theory, it seems hard to deny that the current Rule 801(d)(1)(A) is too narrow. Logically the rule should allow substantive admissibility of all prior inconsistent statements.

But there are several concerns that have been expressed in opposition to expanding the exception, which are addressed in detail in this section.

### ***1. Expanded Substantive Admissibility Benefits Only the Party with the Burden of Proof***

There are two major benefits in litigation when a statement is given substantive rather than impeachment effect:

1. Most importantly, substantive evidence is all that the court may consider when resolving motions related to whether there is enough evidence to create a jury question, or sufficient evidence to support a jury verdict --- e.g., directed verdicts, Criminal Rule 29 motions, motions for summary

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<sup>15</sup> See, e.g., *United States v. Ince*, 21 F.3d 576, 579 (4<sup>th</sup> Cir. 1994) (government’s impeachment of its witness with a prior inconsistent statement was improper where “the only apparent purpose” for the impeachment “was to circumvent the hearsay rule and to expose the jury to otherwise inadmissible evidence). Compare *United States v. Kane*, 944 F.2d 1406 (7<sup>th</sup> Cir. 1991) (impeachment with a prior inconsistent statement was improper where the prosecution had no reason to think that the witness would be hostile or would create the need to impeach her). See also *People v. Fitzpatrick*, 40 N.Y.2d 44, 49-50, 386 N.Y.S.2d 28 (1976) (noting the concern that “the prosecution might misuse impeachment techniques to get before a jury material which could not otherwise be put in evidence because of its extrajudicial nature”; also noting that “a number of authorities have pointed out that the potential for prejudice in the out-of-court statements may be exaggerated in cases where the person making the statement is in court and available for cross-examination”).

judgment, etc.<sup>16</sup> On these legal, sufficiency questions, the judge is not allowed to consider impeachment evidence. Impeachment evidence is about credibility of witnesses, and credibility is the classic jury question.<sup>17</sup> So it is an advantage for a proponent when a prior inconsistent statement is admissible not only to impeach but for its truth.

2. Another advantage of substantive admissibility is that the party can argue to the jury that a fact has been established by the statement (e.g., the time of the crime has been shown by the witness's prior statement); that argument is impermissible if the statement is offered only for impeachment.

An argument has been made, on the basis of the first point above, that the major beneficiary of a rule providing substantive admissibility of prior inconsistent statements is the party with the burden of proof --- and the argument really focuses on concerns about giving the government an advantage in a criminal case.

It seems clearly true that an expansion of Rule 801(d)(1)(A) will help the government in a criminal case. For example, at an Advisory Committee Symposium in 2017, a California prosecutor stated that substantive admissibility of prior inconsistent statements (under the California Rule of Evidence) is critical in gang prosecutions, where many witnesses recant their prior statements out of fear. The prosecutor stated that if the prior statements could not be used substantively, the prosecution often would not be able to present sufficient substantive evidence and the prosecutions would founder.

It is not immediately obvious that providing this evidentiary advantage to the government is a proper reason for rejecting an amendment. There are a number of rule amendments that have favored a party on one side of the v, and that fact has not precluded the amendment. To take three recent examples: 1) the amendments to Rule 702 favor defendants (in the sense that it is defendants that will more often invoke the protections); 2) the amendments to Rule 106 definitely favor criminal defendants (in the sense that criminal defendants will be more likely, in practice, to take advantage of the changes); and 3) the fortification of the notice requirements in Rule 404(b) operate exclusively in favor of criminal defendants. Thus, history shows that if the amendment is valid as a matter of evidence, it should not be rejected just because the benefits are not evenly distributed.

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<sup>16</sup> The substantive/impeachment distinction is not important for motions for a new trial under Criminal Rule 33, because in ruling on such a motion “the district court may weigh the evidence and consider the credibility of the witnesses.” *United States v. Moore*, 76 F.4<sup>th</sup> 1355, 1363 (11<sup>th</sup> Cir. 2023).

<sup>17</sup> See, e.g., *United States v. Green*, 981 F.3d 945, 960 (11<sup>th</sup> Cir. 2020) (reviewing the denial of a Rule 29 motion: “to the extent the appellants’ arguments challenge the credibility of various witnesses, credibility determinations are exclusively within the province of the jury”).

When it comes down to it, most hearsay exceptions favor one side of the v. more than the other. For example, the excited utterance exception favors the prosecution, because most often such statements identify the defendant as a perpetrator (e.g., a 911 call, “my brother just shot me”), and if there were no exception the statements could not be offered as proof of a fact. The same is true with dying declarations --- they are almost universally used by the prosecution against the defendant. And the hearsay exception in Rule 801(d)(2)(D), for statements by an agent about a matter within the scope of authority, was in fact designed for use by plaintiffs in personal injury litigation. The fact that a hearsay exception is used disproportionately by one side of the v. cannot be the reason for rejecting the hearsay exceptions.

So it should not be dispositive that the major beneficiary of expansion of Rule 801(d)(1)(A) is the prosecution in a criminal case. But even if the government is the primary beneficiary, it must be remembered that the defendant will benefit from an expanded Rule 801(d)(1)(A) as well. If the exemption is expanded, it will mean that the defendant, just like the government, will be able to present an inconsistent statement to the jury as proof of a fact. Moreover, if the defendant can use prior inconsistent statements of government witnesses substantively, those statements may be the evidence that would in fact support the defendant’s motion for a judgment of acquittal or an attack on the verdict for insufficient evidence. That is, a piece of substantive proof offered by the defendant strengthens the defense claim about the weakness of the government’s case.

The beneficial effect to the defendant of more expansive substantive admissibility of prior inconsistent statements is demonstrated in the recent case of *United States v. McGirt*, 71 F.4<sup>th</sup> 755 (10<sup>th</sup> Cir. 2023). McGirt was convicted of child sex abuse in an Oklahoma state court, but that verdict was vacated because the crime occurred in Indian country and the Supreme Court found that the state did not have jurisdiction to prosecute. At that state trial, the alleged victim and her grandmother testified. The grandmother’s testimony, in particular, tended to favor McGirt, who was in a relationship with her at that time. At the federal trial, that relationship was over, and both the child and the mother testified against the defendant. Their testimony at the federal trial varied in a number of significant respects from their testimony at the state trial --- that was especially true of the grandmother. The defendant raised these inconsistencies on cross-examination and argued that the witnesses’ prior statements should be admitted as proof of a fact. The trial court disagreed and instructed the jury that the inconsistencies could only be used for impeachment. That ruling was error, because the inconsistent statements were made under oath at the prior state proceeding. They (miraculously) fell within the narrow exception of the current Rule 801(d)(1)(A). The government argued that the error was harmless, but the Tenth Circuit disagreed and reversed the conviction. The court’s analysis provides a compelling example of the importance of the defendant being able to use prior inconsistent statements of government witnesses as substantive evidence.

The court in *McGirt*, in assessing the harmfulness of the error, was required to consider the difference between substantive and impeachment evidence, as applied in this case to the defendant.

It noted that if the inconsistent statements could have been used substantively, the jury could have found as a fact that the child did not act unusually after the alleged event; that the child's accusations had been concocted by the child's mother, who resented McGirt's relationship with the grandmother; and that the child and the defendant were rarely alone in the two-week period in which the alleged abuse occurred. These were all important facts bearing on the defendant's innocence, and all testified to by the grandmother in the prior trial. Moreover, the court pointed out that "the prior [inconsistent] testimony of a witness would not only impeach the testimony of that witness; if used substantively, the prior testimony could also undermine the testimony of other witnesses" for the government. The court reversed the conviction.

In sum, while it is true that expanding substantive admissibility of prior inconsistent statements will often benefit the government, such a change will also benefit the defendant. And the fact that one side of the *v.* might find it more beneficial is not dispositive, given that the change is based on the valid premise that such statements should be admissible because the declarant can be cross-examined about them at trial.

## ***2. A Party Might Want to Use a Prior Inconsistent Statement Only for Impeachment Purposes.***

Some have argued that if prior inconsistent statements become substantively admissible, this would disadvantage a party that wishes only to impeach a witness and does not want to use the statement as proof of a fact. Here is the hypothetical: the defendant is charged with conspiracy to distribute drugs. The drugs were found in a car. A government witness testifies at trial that he saw the defendant standing just outside the car. The witness has previously made a statement that he saw the defendant in the car. The defense counsel wants to raise the inconsistency between the two statements. But his goal is to show that the witness is not to be believed as to *either* of them. He definitely does not want the jury to use the prior statement for the truth of the assertion that the defendant was inside the car.

This is an interesting problem, but in the end it should not mean that expanding substantive admissibility for prior inconsistent statements should be rejected. For one thing, it is an unusual fact situation. In most cases, the prior inconsistent statement will provide substantive content that is useful to the defendant, as in *McGirt, supra*. Moreover, it is risky to impeach a witness in the rare situation in which the content of the statement is so incriminating. And that is true even under current law, because while the jury is instructed not to use the statement as proof that the defendant was in the car, it is probable that at least some jurors will use the statement that way.

More importantly, expanding the Rule 801(d)(1)(A) exemption does not mean that the cross-examiner *must* offer the prior statement as proof of a fact. No rule of evidence prevents a party from choosing not to take advantage of an Evidence Rule. Most often this happens when



parties choose not to object even though they have a valid objection, or choose not to ask for a limiting instruction even though they have a right to do so. But the principle should apply equally when an item of evidence has two permissible uses and a proponent offers it for only one of them.<sup>18</sup> Should the amendment proceed, the Committee Note could clarify that a party is free to refrain from offering a prior inconsistent statement for its truth. Language for a note provision might read as follows:

While the amendment expands the substantive admissibility for prior inconsistent statements, it does not affect the use of any prior inconsistent statement offered only for impeachment purposes. A party may wish to introduce an inconsistent statement not to show that the witness's testimony is false and the prior statement is true, but rather to show that neither is true. Rule 801(d)(1)(A) does not apply if the proponent is not seeking to admit the prior inconsistent statement for its truth. If the proponent is offering the statement solely for impeachment and because it was false, it does not fit the definition of hearsay under Rule 801(c), and so Rule 801(d)(1)(A) never comes into play.

### ***3. The Concern in Civil Cases That Parties Will Avoid Summary Judgment by Filing an Affidavit with an Inconsistent Statement***

At a Hearsay Symposium conducted by the Committee in 2015, the concern was expressed that if prior inconsistent statements are given substantive effect, a party could avoid summary judgment simply by filing an affidavit with an inconsistent statement. The example provided was as follows: a party has made a concession in a deposition that essentially ends its case. The opponent then moves for summary judgment on the basis of the statement. The party, in opposition to the motion, files an affidavit that contradicts the deposition. If that affidavit must be given substantive effect due to an expansion of substantive admissibility under Rule 801(d)(1)(A), then the thinking is that the court would have to deny the motion. In contrast, if it were admissible only for impeachment then it would have no effect, because the court considers only substantive evidence on summary judgment.

If the scenario presented above were an inevitable outcome from an amendment to Rule 801(d)(1)(A), then the amendment would probably need to be rejected, or limited to criminal cases, or subject to an exception that would prohibit the practice (something like, “but not if you lie in an affidavit”). Undoubtedly, it is a bad result to propose an amendment that would provide undeserving parties a shady or fraudulent means to escape summary judgment.

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<sup>18</sup> Examples include offering a hearsay statement as not hearsay where it could be admitted under a hearsay exception and thus useable for its truth. Or offering a statement to impeach a party-witness when the evidence could be admitted under Rule 404(b).

But on closer inspection it appears that the risk of misuse of substantive admissibility of prior inconsistent statements on summary judgment is extremely unlikely. That is so for two reasons:

- First, nobody needs expansion of the hearsay exception to forestall summary judgment by filing an inconsistent statement. This is because an affidavit is an assertion that the affiant will testify at trial to what is in the affidavit, i.e., that it will be presented in admissible form at trial. Fed.R.Civ.P. 56(c). So if, for example, a party makes a statement at the deposition that he didn't read the prospectus, but then files an affidavit saying that he did, he is averring that he will testify at trial that he did. That will be substantive evidence at trial, regardless of Rule 801(d)(1)(A), and this likely would defeat summary judgment. The same would hold true if the statement presented to forestall summary judgment is in an affidavit of a non-party that contradicts a statement the non-party previously made. The non-party's averment of an inconsistent statement must be treated as substantive evidence because it will be provided in an admissible form at trial, i.e., as in-court testimony. That rule has nothing to do with the substantive admissibility of a prior inconsistent statement because the inconsistency will be presented at trial in the form of testimony.

Thus, the only risk of abuse that could possibly be *added* by an expansion to Rule 801(d)(1)(A) is quite narrow: Assume that a statement by a *non-party* in a deposition would terminate the case; but instead of the non-party filing an affidavit with an inconsistent statement, the *party* files an affidavit averring that the non-party *made* an inconsistent statement, and the non-party will be unavailable to testify at trial. In that case, under the existing Rule 801(d)(1)(A), the non-party's inconsistent statement would be admissible only to impeach the deposition testimony under Rule 806 (and so cannot be considered on summary judgment) because it is not presented in a form that would be admissible substantively at trial (i.e., the party's testimony about the witness's inconsistent statement would be hearsay). Under a rule providing for greater substantive admissibility of prior inconsistent statements, that inconsistent statement would have to be considered by the court in opposition to summary judgment. That seems a very small rock on which an amendment could founder.

- Second, even if expanded substantive admissibility of prior inconsistent statements might lead a party in bad faith to think about forestalling summary judgment by creating such a statement, that plan will very probably fail. There is already substantial case law in place to prevent parties from submitting "sham affidavits." Case law in every circuit establishes a "sham affidavit" rule. *See* Edward Brunet, John Parry, & Martin Redish, *Summary Judgment: Federal Law and Practice* § 8:10 (citing cases from every circuit providing authority of district courts to strike sham affidavits). A sham affidavit "is an affidavit that is inadmissible because it contradicts the affiant's previous testimony . . .

unless the earlier testimony was ambiguous, confusing, or the result of a memory lapse.” *Pourghoraishi v. Flying J., Inc.*, 449 F.3d 751, 759 (7<sup>th</sup> Cir. 2006). Thus if a party submits an affidavit solely to contradict a previous statement, it can be rejected, if found as a sham, on summary judgment even if it is substantively admissible. *See also Latimer v. Roaring Toyz, Inc.*, 601 F.3d 1224, 1237 (11<sup>th</sup> Cir. 2010) (“[a] court may determine that an affidavit is a sham when it contradicts previous deposition testimony and the party submitting the affidavit does not give any valid explanation for the contradiction”); *Brown v. Henderson*, 257 F.3d 246, 252 (2<sup>d</sup> Cir. 2001) (affirming summary judgment for employer in a Title VII sex discrimination case, finding the trial court properly rejected the plaintiff’s affidavit that was inconsistent with her own prior deposition testimony); *Martin v. Merrell Dow Pharmaceuticals, Inc.*, 851 F.2d 703 (3<sup>d</sup> Cir. 1988) (trial court properly disregarded the plaintiff’s affidavit “submitted only after [she] faced almost certain defeat in summary judgment,” finding that the affidavit “flatly contradicted no less than eight of her prior sworn statements”); *Halperin v. Abacus Technology Corp.*, 128 F.3d 191, 198 (4<sup>th</sup> Cir. 1997) (affirming summary judgment in an employment discrimination case and finding that the trial court properly disregarded the affidavit of the nonmovant that “contradicts his prior deposition testimony”); *Dotson v. Delta Consol. Industries, Inc.*, 251 F.3d 780, 781(8<sup>th</sup> Cir. 2001) (affirming summary judgment in a Title VII race discrimination case and rejecting nonmovant’s argument that his affidavit created an issue of fact with his earlier conflicting deposition “because we have held many times that a party may not create a question of material fact, and then forestall summary judgment, by submitting an affidavit contradicting his own sworn statements in a deposition”); *Addisu v. Fred Meyer, Inc.*, 198 F.3d 1130, 1138 (9<sup>th</sup> Cir. 2000) (“[G]enerally, a nonmoving party may not create an issue of fact for summary judgment purposes by means of an affidavit contradicting that party’s prior deposition testimony.”).

Thus, the concern that expansion of substantive admissibility of prior inconsistent statements would create a crisis for summary judgment cases is belied both by the narrowness of the problem and by existing law that would prohibit a party from manufacturing an inconsistent statement in an effort to forestall summary judgment.

#### ***4. The Concern That a Conviction Might be Based Solely on a Witness’s Prior Inconsistent Statement.***

Some have argued that it is problematic to expand substantive admissibility of prior inconsistent statements because the end result could be that an accused could be convicted solely on the basis of a prior inconsistent statement. A stark hypothetical would be something like a witness who makes a hearsay statement to his friend, “I saw the defendant set fire to the warehouse.” Then at trial he testifies that the defendant was with him, bowling, that night. There is no other evidence pointing to the defendant’s guilt. The defendant moves under Rule 29 for a

judgment of acquittal due to insufficient evidence. If the trial court could properly reject that motion on the grounds that the prior inconsistent statement is sufficient substantive evidence for a jury to find guilt beyond a reasonable doubt, and then the jury so finds, it would mean that a defendant could be convicted solely on the grounds of a prior inconsistent statement.<sup>19</sup>

There are several responses to this expressed concern. First, the standard for sufficient evidence is whether, viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the defendant guilty beyond a reasonable doubt. *Jackson v. Virginia*, 443 U.S. 307 (1979). It is impossible to speak categorically, but it seems unlikely that the standard could be met by a single inconsistent statement from a witness.<sup>20</sup> Not impossible, though, as seen in a case below. At any rate, the rest of the discussion proceeds with the background that we are addressing a rarely occurring problem.

Second, the fact is that the Evidence Rules are not about sufficiency. They are about admissibility. The justification for expansion of the rule is that a witness's testimony about a prior statement should be treated the same as that witness's testimony about a prior act --- it should be considered by the jury for its truth because there are guarantees of cross-examination, oath, and opportunity to view demeanor. That is the only question regulated by the Federal Rules of Evidence. After that, the questions of sufficiency take over in a review of all the evidence. Put another way, the Advisory Committee has never considered concerns about sufficiency when determining what evidence should be admissible. And that includes the original Advisory Committee. For example, in establishing the excited utterance exception, nobody worried about whether an accused could be convicted solely on the basis of an excited utterance. That's not the business of the Evidence Rules Committee. (If it were, I would suspect that a lot of the hearsay exceptions would need rethinking. Some might be more uncomfortable with the prospect of a conviction based solely on a dying declaration than a conviction based on a statement where the person who made it is subject to cross-examination.)

This very distinction between admissibility and sufficiency was raised in Congress when the Evidence Rules were first being considered, with respect to Rule 801(d)(1)(C), the hearsay exception for prior identifications. Subdivision (d)(1)(C) was included in the rule as prescribed by the Supreme Court but was deleted by Congress. The Senate initially rejected the proposed Rule 801(d)(1)(C); the House acquiesced in order to ensure passage of the Rules of Evidence. Statement of Rep. Hungate, Cong. Rec. H. 9653 (Oct. 6, 1975). The Senate deleted the provision because of strenuous objection by Senator Ervin. He was concerned that a conviction could be based solely

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<sup>19</sup> The fact situation is intentionally stark. If you assume that the statement is combined with other evidence, then that takes you back to the fact that the rule amendment does in fact help the party with the burden of proof to withstand motions for dismissal on the basis of insufficient evidence. The hypothetical deals with the more specific question of whether the prosecution can be based *solely* on prior inconsistent statements.

<sup>20</sup> If it is an inconsistent statement of the accused, it is admissible today as substantive evidence, as a party-opponent statement.

on an unsworn hearsay statement in which the declarant identified the defendant. Cong. Rec. H. 9654 (Oct. 6, 1975).

But Congress then amended Rule 801(d)(1) in 1975 to add back the Advisory Committee's proposal. P.L. 94-113 (1975). The report from the Senate Judiciary Committee on the 1975 amendment found that Senator Ervin's concerns were "misdirected." The report makes three major points: 1) the rule is addressed to admissibility, not sufficiency; 2) most of the hearsay exceptions allow statements into evidence that were not made under oath (thus creating the same risk of a conviction on the basis of hearsay); 3) the declarant who made the identification must under the rule be testifying subject to cross-examination, assuring that "if any discrepancy occurs between the witness's in-court and out-of-court testimony, the opportunity is available to probe, with the witness under oath, the reasons for that discrepancy so that the trier of fact might determine which statement is to be believed." Report of the Committee on the Judiciary, Senate, 94th Cong., 1st Sess., No. 94-199 (1975). Each of these points is applicable to Rule 801(d)(1)(A). So if the proposed expansion were to founder over the concern about a ruling on sufficiency, then the Committee should begin a project to consider elimination of Rule 801(1)(d)(1)(C), and for that matter most or all of the hearsay exceptions in Rules 803 and 804.

That said, the concern about sufficiency might be thought to be too easily dismissed by the simple statement "we are doing admissibility, not sufficiency." So is there a way to expand the exception and yet answer the concern about a conviction based solely on a prior inconsistent statement?

One possible way to address the concern about sufficiency would be to add a corroboration requirement to a hearsay exception for prior inconsistent statements. A corroboration requirement would, by definition, prevent a prior inconsistent statement from being the sole basis of a conviction; if it were the sole support, it wouldn't be admissible in the first place.

Of course, the same question arises: if a corroboration requirement is necessary for prior inconsistent statements, then why not for all hearsay exceptions? Well, there are three hearsay exceptions that do require consideration of corroborating evidence. The hearsay exception for declarations against penal interest, Rule 804(b)(3), contains a "corroborating circumstances" requirement --- which is a mishmash of corroborating evidence and circumstantial guarantees of trustworthiness. That requirement is not, however, based on any concern that a declaration against interest could be sufficient evidence for a conviction --- because that concern, if it exists, applies to *every* hearsay exception. The reason for that requirement was that a Senator expressed concern that without it, criminal defendants would generate "disserving" statements from associates that could be used by the defendant to trump up a defense. So the concern was about reliability, not sufficiency. Similarly, the residual exception, Rule 807, requires a court to consider corroborating evidence as part of the trustworthiness inquiry (again not as a sufficiency consideration). Finally,

under Rule 801(d)(2), independent evidence is required before a hearsay statement can be admitted under the coconspirator objection; again, that is because there are concerns about the reliability of a statement of a purported coconspirator.

Analytics aside, adding a corroboration requirement (for those worried about sufficiency) might also temper any concern that a prior inconsistent statement not under oath might be unreliable. In other words, besides allaying concerns about being the sole source of a conviction, a corroboration requirement would assure greater reliability, by analogy to Rules, 801(d)(2)(E), 804(b)(3) and 807. And while that unreliability argument is analytically misplaced --- because the guarantee of admissibility is based not on the hearsay's reliability but on the ability to cross-examine the declarant --- a corroboration requirement nonetheless can be used as a response to reliability concerns. In other words, adding a corroboration requirement could be a compromise approach to provide some expansion of the exception.

The Louisiana version of Rule 801(d)(1)(A) contains a corroboration requirement in criminal cases. It states that a prior inconsistent statement is admissible substantively “where there exists any additional evidence to corroborate the matter asserted by the prior inconsistent statement.” The rule was adopted in 2004, in response to the failure of prosecutions after coercion of witnesses in several gang prosecutions and in cases of domestic violence and sexual abuse. *State v. D.D.*, 288 So.3d 808, 842 (La. Ct. App. 2019). Case law under the rule looks to the factors you would expect in determining whether prior inconsistent statements have been corroborated. See, e.g., *State v. Duncan*, 91 So.3d 504 (La. Ct. App. 2012) (prior statements by the defendant's associates that they were all walking up a street tracking the victim were corroborated by eyewitness testimony from another person to that effect); *State v. D.D.*, *supra* (prior statement accusing the defendant of child sexual assault was corroborated by a brother's testimony that the defendant isolated the victim on that day, and by parents' testimony that the victim was left alone with the defendant that day); *State v. Updite*, 87 So.3d 257, 263 (La. Ct. App. 2012) (in a domestic violence prosecution where the victim testified that the defendant didn't hit her, the victim's inconsistent statement was sufficiently corroborated: “the victim, her daughter and the defendant all testified as to an argument between the victim and the defendant that turned violent; the victim sustained visible bruises that were consistent with her police statement and were observed by the officer who took her statement”).

For an example of where the corroboration requirement made a difference, see *State v. Cobb*, 144 So.3d 17, 26 (La. Ct. App. 2014). The defendant was charged with defrauding a church while performing repairs. The government contended that a worker, Gray, received checks drawn against the churches account and Gray then signed them over to the defendant, who cashed the checks for himself. Gray so stated to the police, but then at trial he testified that he actually received the money from the defendant on all the cashed checks. Gray's prior inconsistent statement was

admitted for its truth, and the defendant was convicted on the basis of that statement. But the appellate court found error because there was no corroboration:

The State presented no evidence to corroborate Gray's audiotaped interview in which he stated that he did not receive money payable to him by checks drawn on the church's account that were cashed by the defendant. Although the checks endorsed with the names of Gray and the defendant were introduced as evidence, those checks alone do not establish that the defendant took the amounts represented, without the consent of the owner, and with the intent to permanently deprive the owner of that which was taken, as required for a conviction of theft. See La. R.S. 14:67A. Without additional corroborating evidence, Gray's prior inconsistent statement cannot be used as substantive evidence of the defendant's guilt.

So *Cobb* is a case in which a corroboration requirement was applied to prevent a conviction that would have been based solely on prior inconsistent statements.

One of the drafting alternatives below includes a corroboration requirement.

### ***5. The Concern About Problems of Proving Inconsistent Statements***

Under current law, extrinsic evidence of a prior inconsistent statement, offered for impeachment under Rule 613(b), is admissible subject to Rule 403. The trial judge assesses the importance of the inconsistency as it bears on impeaching the witness, and the difficulties of proof in the particular case. *See, e.g., United States v. Winchenbach*, 197 F.3d 548 (1<sup>st</sup> Cir. 1999) (admission of extrinsic evidence of a prior inconsistent statement is considered under Rule 403). Some prior inconsistent statements are harder to prove than others, of course. Those that are written or recorded will be easier, those presented through disputed testimony will be more difficult. Those relative difficulties are taken into account today when a court considers whether to allow extrinsic evidence of a prior inconsistent statement to impeach a witness under Rule 613(b).

If Rule 801(d)(1)(A) is expanded to allow substantive use of a prior inconsistent statement, that means the statement will have to be proved up at trial. Is this a cause for concern, especially where the proof of the statement may be complicated and disputed? What if the inconsistent statement was purportedly made on a video, but the witness claims that the video is a deepfake?

Here are some reasons to think that proof-of-statement concerns should not derail an amendment expanding admissibility of prior inconsistent statements:

1. Facts need to be proven. If a prior inconsistent statement is proof of a fact, there is no reason to treat it any differently than, say, proof that a certain weapon was used, or that a meeting

occurred on June 5, 2022. Proving up statements is probably easier, generally speaking, than proving up other matters, such as a person’s motivation, or causation in toxic tort cases.

2. Extrinsic evidence of prior inconsistent statements is often allowed already to impeach witnesses today, again subject to Rule 403. *See, e.g., United States v. Meza*, 701 F.3d 411 (5<sup>th</sup> Cir. 2012) (audio recording of a prior inconsistent statement found properly admitted under Rule 403 even though the witness did not deny making it). So the burden on the courts and the system in allowing proof of all prior inconsistent statements may be marginal.

3. The Committee previously discussed the possible problems of proving up prior statements in its efforts to amend Rule 106, the rule of completeness. The rule originally covered only statements that were written or recorded. Oral unrecorded statements were not covered. The Advisory Committee’s explanation for the exclusion was “practical considerations” --- presumably that meant a concern about difficulties in proving up oral unrecorded statements. But the 2023 amendment specifically allows completion through oral unrecorded statements. The Committee found that proving up such statements was no more or less difficult than proving any fact without written or recorded statements. The Committee Note to the amendment explains as follows:

The original committee note cites “practical reasons” for limiting the coverage of the rule to writings and recordings. To the extent that the concern was about disputes over the content or existence of an unrecorded statement, that concern does not justify excluding all unrecorded statements completely from the coverage of the rule. *See United States v. Bailey*, 2017 WL 5126163, at \*7 (D. Md. Nov. 16, 2017) (“A blanket rule of prohibition is unwarranted, and invites abuse. Moreover, if the content of some oral statements are disputed and difficult to prove, others are not—because they have been summarized . . . , or because they were witnessed by enough people to assure that what was actually said can be established with sufficient certainty.”). A party seeking completion with an unrecorded statement would of course need to provide admissible evidence that the statement was made. Otherwise, there would be no showing that the original statement is misleading, and the request for completion should be denied. In some cases, the court may find that the difficulty in proving the completing statement substantially outweighs its probative value—in which case exclusion is possible under Rule 403.

The same analysis logically applies to oral, unrecorded prior inconsistent statements. Any difficulty in proof is taken into account under Rule 403, and a ban of all such statements because of difficulty in proving some is overkill.

4. Questions about “deepfakes” and altered evidence are no different here than they are anywhere else. There is no justification for singling out evidence of prior inconsistent statements as a particular problem of deepfakes.



### ***C. State Variations on Prior Inconsistent Statement Admissibility***

In deciding whether to expand the admissibility of prior inconsistent statements, there are many reference points provided in the State rules of evidence. It is particularly notable that a large number of states have rejected the Congressional limitation on substantive admissibility of prior inconsistent statements. The state deviation is greater than that with respect to most of the other Federal Rules of Evidence.

#### ***1. Rejection of Congressional limitation in Rule 801(d)(1)(A):***

Many of the states rejected the Congressional limitation on substantive admissibility of prior inconsistent statements. In the following states, all prior inconsistent statements are admissible for their truth:

Alaska  
Arizona  
California  
Colorado  
Georgia  
Montana  
Nevada  
Rhode Island  
South Carolina  
Wisconsin.<sup>21</sup>

#### ***2. Variations short of outright rejection of the Congressional limitation.***

Other states provide less onerous alternatives to the Congressional restriction on substantive admissibility of prior inconsistent statements. For example:

Arkansas requires prior oath at a formal proceeding for civil cases only.<sup>22</sup>

Connecticut addresses the concern about whether the statement was ever made with a narrower limitation. The exception covers:

A prior inconsistent statement of a witness, provided (A) the statement is in writing or otherwise recorded by audiotape, videotape, or some other equally reliable medium, (B)

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<sup>21</sup> See Alaska R.Evid. 801(d)(1)(A); Ariz. R. Evid. 801(d)(1)(a); Cal. Ev. Code §1235; Col.R.Evid. 801(d)(1)(A); Ga. R.Evid. 801(d)(1)(A); Montana R. Evid. 801(d)(1)(A); 4 Nev. Stat. §51.035 (2)(A); R.I. R. Evid. 801(d)(1)(A); S.C. R. Evid. 801(d)(1)(A).

It is worth remembering that Delaware, Kansas, and Puerto Rico admit *all* prior statements of testifying witnesses over a hearsay objection.

<sup>22</sup> Ark. R.Evid. 801(d)(1)(A).

the writing or recording is duly authenticated as that of the witness, and (C) the witness has personal knowledge of the contents of the statement.<sup>23</sup>

Requirements (B) and (C) are surplusage because they are covered by other rules (authentication by Rule 901 and personal knowledge by Rule 602).

Hawaii, similar to Connecticut, expands the exception beyond the Congressional limitation, while still addressing concerns that the statement was never made. Besides statements under oath at a prior proceeding, Hawaii provides substantive admissibility for prior inconsistent statements when they are “reduced to writing and signed or otherwise adopted by the declarant” and also when they are “recorded in substantially verbatim fashion by stenographic, mechanical, electrical, or other means contemporaneously with the making of the statement.”<sup>24</sup>

Illinois, similar to Connecticut, addresses the concern that the statement was never made. Prior inconsistent statements are admissible substantively if properly recorded, but Illinois also includes as a ground for admissibility that “the declarant acknowledged under oath the making of the statement either in the declarant’s testimony at the hearing or trial in which the admission into evidence of the prior statement is being sought or at a trial, hearing, or other proceeding, or in a deposition.”<sup>25</sup> Under the Illinois rule, the statement does not need to be recorded if the declarant acknowledges making the statement while testifying at trial. The idea is that there should be no doubt about the existence of the prior statement if the declarant actually acknowledges making it. The concern, though, is how to determine whether a witness has actually “acknowledged” the prior statement. If the witness says “yeah, I might have said something about this before” is that an acknowledgment?

Louisiana does not permit substantive use of prior inconsistent statements in a civil case. As discussed above, prior inconsistent statements in Louisiana are admissible substantively in a criminal case “where there exists any additional evidence to corroborate the matter asserted by the prior inconsistent statement.”<sup>26</sup> Louisiana’s corroboration requirement is part of a drafting alternative in the final section, *infra*.

Maryland has a provision similar to Connecticut, allowing substantive use of a prior inconsistent statement if there is assurance that it was actually made. Such statements are admissible if they have been “reduced to writing and \* \* \* signed by the declarant” or “recorded in substantially verbatim fashion by stenographic or electronic means contemporaneously with the making of the statement.”<sup>27</sup>

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<sup>23</sup> Conn. Code of Evid. R. 8-1.

<sup>24</sup> Hawaii R. Evid. 801(d)(1)(A).

<sup>25</sup> Ill. R.Evid. 801(d)(1)(A).

<sup>26</sup> La. Code Evid. 801(d)(1)(A) .

<sup>27</sup> Md. R. Evid. 5-802.1.

New Jersey provides for substantive admissibility of all prior inconsistent statements of a witness called by an opposing party. However, if the witness is called by the proponent, safeguards must be met. The proponent must show that the statement “(A) is contained in a sound recording or in a writing made or signed by the witness in circumstances establishing its reliability or (B) was given under oath subject to the penalty of perjury at a trial or other judicial, quasi-judicial, legislative, administrative or grand jury proceeding, or in a deposition.”<sup>28</sup> It is unclear why, assuming there are risks of reliability and questions about whether the statement was ever made, those risks are only raised when the proponent calls the witness.

North Dakota applies the Congressional limitation in Rule 801(d)(1)(A) in criminal cases only.<sup>29</sup>

Pennsylvania, like Connecticut, expands beyond the Congressional limitation, but with an attempt to assure that the witness actually made the prior statement:

**(1) Prior Inconsistent Statement of Declarant-Witness.** A prior statement by a declarant-witness that is inconsistent with the declarant-witness’s testimony and:

- (A) was given under oath subject to the penalty of perjury at a trial, hearing, or other proceeding, or in a deposition;
- (B) is a writing signed and adopted by the declarant; or
- (C) is a verbatim contemporaneous electronic, audiotaped, or videotaped recording of an oral statement.<sup>30</sup>

Utah rejects the congressional limitation and also treats prior statements as “not hearsay” when the witness denies or has forgotten the statement. So there appears to be no concern at all in Utah about whether the prior inconsistent statement was ever made:

**(d) Statements That Are Not Hearsay.** A statement that meets the following conditions is not hearsay:

(1) *A Declarant-Witness’s Prior Statement.* The declarant testifies and is subject to cross-examination about a prior statement, and the statement:

- (A) is inconsistent with the declarant’s testimony or the declarant denies having made the statement or has forgotten \* \* \*<sup>31</sup>

Wyoming applies the Congressional limitation only in criminal cases.<sup>32</sup>

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<sup>28</sup> NJRE 801(d)(1)(A).

<sup>29</sup> N.D.R. Ev. 801(d)(1)(A).

<sup>30</sup> Pa. R. Ev. 803.1(1).

<sup>31</sup> Utah R. Evid. 801(d)(1)(A).

<sup>32</sup> Wyo. R. Evid. 801(d)(1)(A).

### III. Prior Consistent Statements

#### *A. A Short History of Rule 801(d)(1)(B), Ending With the 2014 Amendment*

The original Advisory Committee’s proposed rule creating a hearsay exemption for certain prior consistent statements turned out to be far less controversial in Congress than its proposal to allow all prior inconsistent statements. Part of the reason for the different treatment is that the substantive use of prior consistent statements is simply less important a matter. Treating inconsistent statements as substantive evidence can provide proof of a fact when it is the only evidence of that fact. That is important for motions to dismiss for insufficient evidence and the like. In contrast, the difference between substantive and credibility-based use of prior consistent statements is evanescent – the witness has already testified, thus providing substantive evidence, and that testimony can be argued to the jury as proof of a fact. Giving substantive effect to a prior consistent statement will usually have little to no substantive effect. So there was not as much to get worked up about when it came to consistent statements.

That said, the Advisory Committee did carve out certain consistent statements for substantive use, tying the exemption to an attack on the witness’s credibility. The Committee Note explaining the provision puts it this way:

“The prior statement is consistent with the testimony given on the stand, and, if the opposite party wishes to open the door for its admission in evidence [by attacking the credibility of the witness-declarant], no sound reason is apparent why it should not be received generally.”<sup>33</sup>

So the hearsay exemption is all about *witness rehabilitation*, and in that light, a hearsay exemption makes a lot of sense: if the consistent statement *is* going to be admitted to rehabilitate a witness, what sense does it make to exclude it from substantive use as hearsay?

The problem with the original Rule 801(d)(1)(B) was that it provided for substantive admissibility of only some, and not all, consistent statements that are properly admitted to rehabilitate a witness. The original rule provided for substantive admissibility only when the witness was attacked for having a bad motive or for recent fabrication, and only when the statement predated the existence of the motive or the interest to fabricate.<sup>34</sup> But other consistent statements can rehabilitate other kinds of credibility attacks, and the same justification for substantive admissibility can be made: the party has opened the door by attacking the witness, and the consistent statement rebuts the attack.

The Advisory Committee Note to the 2014 amendment explains the problem of the too-narrow focus of the original rule, as well as the solution that the Advisory Committee provided. The Committee Note explains as follows:

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<sup>33</sup> Advisory Committee Note to Rule 801(d)(1)(B).

<sup>34</sup> *Tome v. United States*, 513 U.S. 150 (1995).

Though the original Rule 801(d)(1)(B) provided for substantive use of certain prior consistent statements, the scope of that Rule was limited. The Rule covered only those consistent statements that were offered to rebut charges of recent fabrication or improper motive or influence. The Rule did not, for example, provide for substantive admissibility of consistent statements that are probative to explain what otherwise appears to be an inconsistency in the witness’s testimony. Nor did it cover consistent statements that would be probative to rebut a charge of faulty memory. Thus, the Rule left many prior consistent statements potentially admissible only for the limited purpose of rehabilitating a witness’s credibility. The original Rule also led to some conflict in the cases; some courts distinguished between substantive and rehabilitative use for prior consistent statements, while others appeared to hold that prior consistent statements must be admissible under Rule 801(d)(1)(B) or not at all.

\* \* \* The intent of the amendment is to extend substantive effect to consistent statements that rebut other attacks on a witness — such as the charges of inconsistency or faulty memory.

The 2014 Advisory Committee note makes a point of emphasizing the limited scope of the amendment. It does not provide for admission of more prior consistent statements. It simply makes all prior consistent statements that are admissible to rehabilitate the witness’s credibility also admissible for the truth of the matter asserted.

The amendment does not change the traditional and well-accepted limits on bringing prior consistent statements before the factfinder for credibility purposes. It does not allow impermissible bolstering of a witness. As before, prior consistent statements under the amendment may be brought before the factfinder only if they properly rehabilitate a witness whose credibility has been attacked. As before, to be admissible for rehabilitation, a prior consistent statement must satisfy the strictures of Rule 403. As before, the trial court has ample discretion to exclude prior consistent statements that are cumulative accounts of an event. The amendment does not make any consistent statement admissible that was not admissible previously — the only difference is that prior consistent statements otherwise admissible for rehabilitation are now admissible substantively as well.

**So, Rule 801(d)(1)(B), as amended in 2014, provides as follows:**

**(d) Statements That Are Not Hearsay.** A statement that meets the following conditions is not hearsay:

**(1) *A Declarant-Witness’s Prior Statement.*** The declarant testifies and is subject to cross-examination about a prior statement, and the statement:

\* \* \*

**(B)** is consistent with the declarant’s testimony and is offered;

(i) to rebut an express or implied charge that the declarant recently fabricated it or acted from a recent improper influence or motive in so testifying; or

(ii) to rehabilitate the declarant's credibility as a witness when attacked on another ground;

\* \* \*

The intended effect of the amendment is to do away with the need to provide an unhelpful limiting instruction for prior consistent statements that are admissible anyway to rehabilitate the witness's credibility. No longer need an instruction be given, for example, that "the statement that the witness made can be used only insofar as it explains his inconsistent statement, and not for the truth of any assertion in the consistent statement." These limiting instructions were considered not worth the candle due to their inherent difficulty and the lack of a practical distinction between substantive and credibility use of prior consistent statements.

If another amendment to Rule 801(d)(1)(B) were to be considered, the only real possibility would be to untether substantive admissibility from admissibility to rehabilitate, and make prior consistent statements admissible even if they did not rehabilitate credibility. That would be the upshot of an amendment that would treat all prior witness statements as exempt from the hearsay rule. But tying admissibility of prior consistent statements to rehabilitation of credibility has the virtue of avoiding the problem of parties trying to manufacture consistent statements for trial. (That would be "impermissible bolstering" in lawyer-speak.) And the current tie to rehabilitation has the further virtue of being grounded in the policy of "opening the door" --- admissibility is dependent on an attack on the witness's credibility. If substantive admissibility were untethered from rehabilitation, then the opponent would lose the control over admissibility that the original Advisory Committee found to be important.

For these reasons, prior consistent statements are probably better left where they are --- the 2014 amendment has done good work and there is no good reason to provide for greater admissibility of prior consistent statements. If a consistent statement can't be used to rehabilitate credibility, then its offer at trial may well be just an attempt to impermissibly bolster the witness. Moreover, if a prior consistent statement *does* have some weight and reliability independent from rehabilitation, it may at any rate qualify for admission under another hearsay exception. For example, if the prosecution calls a witness to testify that he saw a murder, the witness's 911 call placed immediately after the event would not be admissible under Rule 801(d)(1)(B), in the absence of an attack on credibility that the statement would rebut. But it would be independently admissible as substantive evidence as an excited utterance.<sup>35</sup> So an expansion of Rule 801(d)(1)(B) does not seem necessary, and is likely to cause more harm than good.

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<sup>35</sup> Also note that if the prior consistent statement is one of identification, then it is admissible independently under Rule 801(d)(1)(C). The point being that you don't need a problematic expansion of the exception to cover those relatively few consistent statements that are anything more than impermissible bolstering. There are already hearsay exceptions in place to cover the consistent statements that are worth covering.

## IV. Prior Statements of Identification

The Advisory Committee Note to Rule 801(d)(1)(C) explains the reason for carving out an exception for prior statements of identification: the prior identification is more reliable than the in-court identification, because it was made “earlier in time under less suggestive conditions.” To this explanation can be added the fact that the identifying witness must be subject to cross-examination --- and that cross-examination in this particular circumstance can be quite useful because the witness can be asked not only about the process of identification, but also about the basis that the witness had for making the identification in the first place (how far away he was from the robbery, whether he was wearing his glasses, etc.).

In practice, Rule 801(d)(1)(C) has proved relatively uncontroversial. Perhaps the most contested point was resolved by the Supreme Court in *United States v. Owens*,<sup>36</sup> which allows admission of a prior identification even though the witness had no memory about the reasons for making that identification. The witness without memory was found “subject to cross-examination” within the meaning of the Rule. There appears to be no groundswell for reconsidering *Owens* by way of amendment to the Evidence Rules. Nor should there be, as a faulty memory can well be the target for effective cross-examination, and it would be difficult if not impossible to craft a rule that would set forth criteria for when an attack on faulty memory will or will not be productive in an individual case.

Insofar as prior statements of identification are concerned, it would seem that no amendment is necessary or appropriate. All of them are admissible so long as the declarant is testifying. No expansion is possible, and a contraction is not justified as a matter of policy.

## V. Drafting Alternatives

What follows are two versions of an amendment to Rule 801(d)(1)(A), with accompanying Committee Notes. Option 1 is to follow the California model and allow all prior inconsistent statements of testifying witnesses to be admissible. Option 2 imposes a corroboration requirement before a prior inconsistent statement is substantively admissible.

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<sup>36</sup> 484 U.S. 554 (1988).

## ***Option 1: All Prior Inconsistent Statements Substantively Admissible:***

### **Rule 801. Definitions That Apply to This Article; Exclusions from Hearsay**

\* \* \*

**(d) Statements That Are Not Hearsay.** A statement that meets the following conditions is not hearsay:

**(1) *A Declarant-Witness's Prior Statement.*** The declarant testifies and is subject to cross-examination about a prior statement, and the statement:

**(A)** is inconsistent with the declarant's testimony ~~and was given under penalty of perjury at a trial, hearing, or other proceeding or in a deposition;~~

**(B)** is consistent with the declarant's testimony and is offered:  
**(i)** to rebut an express or implied charge that the declarant recently fabricated it or acted from a recent improper influence or motive in so testifying; or  
**(ii)** to rehabilitate the declarant's credibility as a witness when attacked on another ground; or

**(C)** identifies a person as someone the declarant perceived earlier.

\* \* \*

### **Possible Committee Note**

The amendment provides for substantive admissibility of inconsistent statements of a testifying witness. These statements should be admissible over a hearsay objection, because the declarant is by definition testifying under oath and is subject to cross-examination about the statement. The Committee has determined, as have a number of states, that delayed cross-examination under oath is sufficient to allay the concerns addressed by the hearsay rule. As the original Advisory Committee noted, the dangers of hearsay are "largely nonexistent" because the declarant is in court and can be cross-examined about the prior statement and the underlying subject matter, and the trier of fact "has the declarant before it and can observe the demeanor and the nature of his testimony as he denies it or tries to explain away the inconsistency." Adv. Comm. Note to Rule 801(d)(1)(A) (quoting California Law Revision Commission). A major advantage of the amendment is that it avoids the need to give a confusing jury instruction that seeks to distinguish between substantive and impeachment uses for prior inconsistent statements.

The original rule, requiring that the prior statement be made under oath at a formal hearing, is unduly narrow and has generally been of use only to prosecutors, where



witnesses testify at the grand jury and then testify inconsistently at trial. The original rule was based on three premises. The first was that a prior statement under oath was more reliable than a prior statement that was not. While this is probably so, the ground of admissibility for the exception is that the prior statement was made by the very person who is produced at trial and subject to cross examination about it, under oath. Thus any concerns about reliability are well-addressed by cross-examination, the oath at trial, and the factfinder’s ability to view the demeanor of the person who made the statement. The second premise was a concern that statements not made at formal proceedings could be difficult to prove. But there is no reason to think that an unrecorded prior inconsistent statement is any more difficult to prove than any other unrecorded fact. And any difficulties in proof can be taken into account by the court under Rule 403. See the Committee Note to the 2023 amendment to Rule 106. The third premise was that if a witness denies making the prior statement, then cross-examination becomes difficult. But there is effective cross-examination in the very denial. *See Nelson v. O’Neil*, 402 U.S. 622, 629 (1971) (noting that the declarant’s denial of the prior statement “was more favorable to the respondent than any that cross-examination by counsel could possibly have produced, had [the declarant] affirmed the statement as his”).

While the amendment allows for substantive admissibility of prior inconsistent statements, a party is free to offer a prior inconsistent statement solely for impeachment purposes if it chooses to do so. For example, a party may wish to introduce an inconsistent statement not to show that the witness’s testimony is false and prior statement is true, but rather to show that neither is true. If the proponent is offering the statement solely for impeachment and because it was false, it does not fit the definition of hearsay under Rule 801(c), and so Rule 801(d)(1)(A) never comes into play.

Nothing in the amendment mandates that a prior inconsistent statement is sufficient evidence of a claim or defense. The rule is one of admissibility, not sufficiency.

The amendment does not change the Rule 613(b) timing requirement for introducing extrinsic evidence of a prior inconsistent statement.

## ***Option 2 — Adding a Corroboration Requirement***

### **Rule 801. Definitions That Apply to This Article; Exclusions from Hearsay**

\* \* \*

**(d) Statements That Are Not Hearsay.** A statement that meets the following conditions is not hearsay:

**(1) *A Declarant-Witness’s Prior Statement.*** The declarant testifies and is subject to cross-examination about a prior statement, and the statement:

**(A)** is inconsistent with the declarant’s testimony and is corroborated by independent evidence; ~~and was given under penalty of perjury at a trial, hearing, or other proceeding or in a deposition;~~

- (B) is consistent with the declarant’s testimony and is offered:
  - (i) to rebut an express or implied charge that the declarant recently fabricated it or acted from a recent improper influence or motive in so testifying; or
  - (ii) to rehabilitate the declarant’s credibility as a witness when attacked on another ground; or
- (C) identifies a person as someone the declarant perceived earlier.

\* \* \*

### Possible Committee Note

The amendment provides for substantive admissibility of inconsistent statements of a testifying witness when they are corroborated by independent evidence. The justification for the amendment is that the declarant is by definition testifying under oath and is subject to cross-examination about the statement. The Committee has determined, as have a number of states, that delayed cross-examination under oath is ordinarily sufficient to allay the concerns addressed by the hearsay rule. As the original Advisory Committee noted, the dangers against of hearsay rule are “largely nonexistent” because the declarant is in court and can be cross-examined about the prior statement and the underlying subject matter, and the trier of fact “has the declarant before it and can observe the demeanor and the nature of his testimony as he denies it or tries to explain away the inconsistency.” Adv. Comm. Note to Rule 801(d)(1)(A) (quoting California Law Revision Commission). A major advantage of the amendment is that it avoids the need to give a confusing jury instruction that seeks to distinguish between substantive and impeachment uses for prior inconsistent statements.

The original rule, requiring that the prior statement be made under oath at a formal hearing, is unduly narrow and has generally been of use only to prosecutors, where witnesses testify at the grand jury and then testify inconsistently at trial. The original rule was based in part on a concern that statements not made at formal proceedings could be difficult to prove. But there is no reason to think that an unrecorded prior inconsistent statement is any more difficult to prove than any other unrecorded fact. And any difficulties in proof can be taken into account by the court under Rule 403. See the Committee Note to the 2023 amendment to Rule 106. The original rule was also based on the premise that if a witness denies making the prior statement, then cross-examination becomes difficult. But there is effective cross-examination in the very denial.

The corroboration requirement imposed by the amendment seeks to allay concerns that a claim or defense could be established solely through a prior inconsistent statement. It also allays concerns about potential unreliability.

While the amendment allows for substantive admissibility of prior inconsistent statements, a party is free to offer a prior inconsistent statement solely for impeachment purposes if it chooses to do so. For example, a party may wish to introduce an inconsistent statement not to show that the witness's testimony is false and prior statement is true, but rather to show that neither is true. If the proponent is offering the statement solely for impeachment and because it was false, it does not fit the definition of hearsay under Rule 801(c), and so Rule 801(d)(1)(A) never comes into play.

The amendment does not change the Rule 613(b) timing requirement for introducing extrinsic evidence of a prior inconsistent statement.

***Reporter's Note: In this alternative, the corroboration requirement applies for every prior inconsistent statement. Another alternative is to apply the requirement only against the government. That limitation would be directed to the animating concern that an accused will be convicted solely on the basis of a prior inconsistent statement. It seems, though, that if you are going to add a corroboration requirement, it should probably extend across the board. This is because the corroboration requirement is addressed not only to sufficiency concerns, but also to arguments (however misguided) that a prior inconsistent statement might be unreliable.***

***If the Committee does wish to limit the corroboration requirement to statements offered by the prosecution, it muddles the drafting a bit, but it can be done. It would look like this:***

**(1) A Declarant-Witness's Prior Statement.** The declarant testifies and is subject to cross-examination about a prior statement, and the statement:

**(A)** is inconsistent with the declarant's testimony and, if offered by the prosecution in a criminal case, is corroborated by independent evidence; ~~and was given under penalty of perjury at a trial, hearing, or other proceeding or in a deposition;~~

Minor changes to the Committee Note can be made accordingly.

# TAB 5

# TAB 5A

# FORDHAM

## University School of Law

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Memorandum To: Advisory Committee on Evidence Rules  
From: Daniel J. Capra, Reporter  
Re: Amendments to Rule 609(a)(1)  
Date: April 1, 2024

At its last meeting, Professor Jeffrey Bellin made a presentation recommending the abrogation of Rule 609, which allows impeachment of witnesses with prior convictions under certain circumstances. Rule 609 covers the use of prior convictions to impeach a witness's character for truthfulness. Rule 609(a) covers recent convictions --- less than ten years between the date of trial and the witness's release from confinement. Rule 609(a) divides recent convictions into two types --- those that are grounded in dishonesty and those that are not. Rule 609(a)(1) covers the latter.

The Committee was not in favor of a complete abrogation of Rule 609, because that would mean that convictions for perjury and other lying crimes could not be admitted, and such lying-based convictions were considered probative of the witness's character for truthfulness. But the Committee did resolve to consider the abrogation of Rule 609(a)(1), which allows impeachment with convictions that are not based on lying, subject to balancing tests. Discussion at the Committee meeting indicated that at least some members found convictions offered under Rule 609(a)(1) to be only minimally probative of the likelihood that the witness will lie on the stand -- and that they could be very prejudicial, especially when offered against criminal defendants, and especially when they are similar to the crime with which the defendant was charged.

Rule 609(a) currently provides as follows:

### **Rule 609. Impeachment by Evidence of a Criminal Conviction**

**(a)In General.** The following rules apply to attacking a witness's character for truthfulness by evidence of a criminal conviction:

(1) for a crime that, in the convicting jurisdiction, was punishable by death or by imprisonment for more than one year, the evidence:

(A) must be admitted, subject to Rule 403, in a civil case or in a criminal case in which the witness is not a defendant; and

(B) must be admitted in a criminal case in which the witness is a defendant, if the probative value of the evidence outweighs its prejudicial effect to that defendant; and

(2) for any crime regardless of the punishment, the evidence must be admitted if the court can readily determine that establishing the elements of the crime required proving—or the witness’s admitting—a dishonest act or false statement.

The basic argument against Rule 609(a)(1) is built on four points:

- An attack on a witness’s character for truthfulness is, in the first place, weak because even if the witness is a lying person --- even if he lies all the time --- it’s another thing entirely to lie under oath at a trial.

- Probative value is especially diminished when the conviction is offered under Rule 609(a)(1), because the crime does not involve dishonesty or false statement. Thus, as Judge Rice points out, “[n]umerous scholars cite the absence of a direct correlation between a witness’s non-dishonesty felony convictions and propensity to lie.”<sup>1</sup>

- As Professor Bellin pointed out at the last meeting, the probative value of a prior conviction for impeachment is further diminished when it is the criminal defendant who would testify. His paper stated as follows:

Since everyone knows that criminal defendants face great pressure to lie when testifying, Rule 609 adds nothing legitimate to the process. Rule 609 admits prior convictions to suggest that the witness might lie under oath. But for criminal defendants, the pressure to lie created by the prospect of incarceration already establishes that point beyond doubt. And the defendant’s self-interest in liberty is many orders of magnitude greater than any hypothetical dishonesty-inducing character flaw revealed by a prior conviction. If a defendant’s self-interest in avoiding criminal punishment is analogized to a lake of credibility impeachment, the fact of a prior conviction is a drop of rain. Perhaps the raindrop adds something. But its impact is too small to matter.

- The consequence of impeachment under Rule 609(a)(1) is that, on the basis of slight to nil probative value, a criminal defendant faced with impeachment will be deterred from exercising his right to testify, because of the fear of unfair prejudice. And this deterrence is especially strong when the conviction is similar to the one being charged.

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<sup>1</sup> Timothy Rice, Restoring Justice: Purging Evil from Federal Rule of Evidence 609, 89 Temple L.Rev. 683, 691 (2017).

This memorandum is intended to assist the Committee in analyzing the above arguments for abrogating Rule 609(a)(1). Part One describes the fight in Congress that led to Rule 609. Part Two sets forth state variations. Part Three drills down into analyzing the basic arguments for abrogation --- lack of probative value, unfair prejudice, and deterrence of testimony. Part Four discusses the extent of an amendment, and the need for corresponding amendments. Part Five discusses various drafting alternatives --- including an amendment to Rule 608, which would be necessary to prevent parties from using bad act impeachment for acts that underlie convictions that would be inadmissible.

Behind this memo in the agenda book is a digest of Rule 609(a)(1) cases, which includes many cases that indicate Rule 609(a)(1) is applied very liberally against criminal defendants, allowing impeachment where the marginal probative value of the conviction seems low and the prejudice seems high.

Also behind this memo is a report on results obtained from a survey of public defenders, assessing whether Rule 609(a)(1) actually affects an accused's decision not to testify. Finally, statements by Public Defenders on the pernicious effect of Rule 609(a)(1) are included.

At this meeting, the Committee will consider whether to propose an amendment to Rule 609 to the Standing Committee, for release for public comment. Other options are to continue to consider the proposal, or to take it off the agenda.

## **I. Legislative History: The Dispute in Congress on Rule 609(a)**

### ***A. Introduction and Background***

The practice of impeaching criminal defendants with felony convictions was not originally intended to be punitive. At one time under the common law, felons were not allowed to testify at all, because they were considered incompetent due to their self-interest. The Supreme Court, in *Rosen v. United States*, 246 U.S. 461, 471 (1918), abandoned this rule of incompetency, stating that “the truth is more likely to be arrived at by hearing the testimony of all persons of competent understanding who may seem to have knowledge of the facts involved in a case, leaving the credit and weight of such testimony to be determined by the jury.” Thus the concern over the character of a felon-witness was seen (as it is today) as a question of credibility and not competency. The practice of impeachment with prior convictions was considered to be a more targeted way to address the problem of a felon-witness's credibility than a complete bar to testimony; it “was a byproduct of a progressive reform that removed rather than added to the obstacles facing convicts (including, of course, many criminal defendants) who sought to testify.” 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, 295 (2008).

It turns out that the right to testify is a gift with strings attached. When defendants couldn't testify, the jury could not draw a negative inference. Now that they can testify, juries can draw a



negative inference from the absence of testimony, despite being instructed not to do so. Empirical research conducted by Jeffrey Bellin, stemming from mock trials, juror interviews after real cases, and other sources, indicates that defendants who do not testify in fact suffer a silence penalty.<sup>2</sup> Broad impeachment rules end up putting the criminal defendant in a box: testify and suffer unfair prejudice when prior convictions are introduced, or don't testify and suffer a silence penalty. Professor Bellin's data indicates that "the 'silence penalty' harms defendants nearly as much as the more-universally-dreaded 'prior offender penalty.'" That is, a defendant who remains silent at trial suffers about the same damage to his acquittal prospects as a defendant who testifies and is impeached with a prior conviction."

### ***B. Rule 609 in Congress***

The legislative history of Rule 609(a) indicates deep disagreement among the Advisory Committee, the House, and the Senate about the value of prior conviction impeachment, particularly when the witness is the accused. Congress spent more time on Rule 609(a) than on any other evidence rule. While the debate was often couched in narrow terms, the argument in Congress became increasingly broad and ideological, mostly focusing on how to balance the rights of an accused against the rights of society to defend itself from criminals.

Rule 609(a) in the Preliminary Draft of the Federal Rules of Evidence would have provided a rule that all convictions for crimes involving dishonesty or false statements, as well as all felony convictions, were automatically admissible. The drafters made no provision within the proposed rule for discretionary exclusion. In proposing this rule, the Advisory Committee was consistent with the common law, under which all felonies, and all misdemeanors involving false statements, were automatically admissible to impeach all witnesses.

Public comment on the Advisory Committee's Preliminary Draft criticized the absence of any discretion to exclude even in the case of a risk of unfair prejudice to an accused in a criminal case. Rule 609(a) was unfavorably compared to the approach of a then-recent D.C. Circuit Court of Appeals decision, *Luck v. United States*, 348 F.2d 763 (D.C.Cir. 1965). In *Luck*, the court construed a provision of the District of Columbia Code as permitting discretionary exclusion of convictions offered to impeach an accused. (The D.C. Rule provided that prior convictions "may" be admitted). The Advisory Committee responded to the public criticism by adding a section to Rule 609(a) in the Revised Draft of the Federal Rules of Evidence, providing for the exclusion of conviction evidence if its probative value was substantially outweighed by the danger of unfair prejudice (i.e., the Rule 403 test). The drafters also revised their committee note to make clear their reliance on the *Luck* doctrine.

Unfortunately for the drafters, less than a year before promulgation of the Revised Draft, Congress had amended the District of Columbia Code for the purpose of eliminating the *Luck*

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<sup>2</sup> Jeffrey Bellin, *The Silence Penalty*, 103 Iowa L. Rev. 395 (2018).

doctrine. (The language was changed from “may be admitted” to “shall be admitted”). The drafters apparently had been unaware of that amendment. Senator McClellan, a powerful member of the Judiciary Committee, the point man on the Evidence Rules in the Senate, and an outspoken advocate for prosecutorial interests, adamantly objected to Rule 609(a) in the Revised Draft, characterizing it as an intentional effort by the drafters to undermine congressional policy as expressed in its amendment to the District of Columbia Code. This supposed affront to congressional will contributed to Senator McClellan’s subsequent legislative attempt to limit the rulemaking power of the Supreme Court, a proposal that threatened the entire project to create a Federal Rules of Evidence. The drafters reacted to Senator McClellan’s ire by returning, in the next draft, to the form of Rule 609(a) employed in the Preliminary Draft — i.e., automatic admissibility of all felonies and all convictions based on dishonesty or false statement. The Advisory Committee’s Note was rewritten to explain that the purpose of this reversal was to make the rule consistent with congressional policy as manifested in the 1970 amendments to the District of Columbia Code. The Supreme Court submitted subdivision (a) to Congress in this form.

Significant discussion of Rule 609(a) took place during hearings held by a subcommittee of the House Judiciary Committee. Most witnesses and correspondents favored a return to the Revised Draft approach by recognizing judicial discretion to exclude any conviction for unfair prejudice. The House subcommittee was at least partially swayed by the tenor of these comments. In the first Committee Print of June 28, 1973, a provision was added to Rule 609(a) giving the courts discretion to exclude convictions for “crimes punishable by death or imprisonment in excess of one year.” No similar discretion was recognized for crimes “involving dishonesty or false statement.” Thus, the subcommittee chose a middle ground between the Revised Draft’s grant of discretion to exclude for unfair prejudice in all cases and the Supreme Court Draft’s absolute denial of discretion. And this was the first recognition of a distinction in probative value between crimes that involve dishonesty or false statement and crimes that don’t.

The full House Judiciary Committee approved yet another version of subdivision (a), rejecting the subcommittee version because it did not adequately protect an accused from abuse. The Committee’s version permitted convictions to be admitted “only if the crime involved dishonesty or false statement.” No provision was made for balancing prejudice and probative value for those falsity-based convictions. (This is essentially what would be the rule if Rule 609(a)(1) is abrogated).

The floor debate in the House over Rule 609(a) focused upon the appropriate balance between society’s interests in seeing the guilty convicted and the accused’s right to testify. An amendment was proposed that substituted the language of the original Supreme Court version, eliminating discretion to exclude for unfair prejudice and permitting admission of all felony convictions, as well as any crime involving dishonesty or false statement. That amendment was defeated and the House Judiciary Committee’s version of Rule 609 was passed: i.e., only falsity-based convictions would be admissible, but automatically so. So one way to look at Congressional intent is that abrogating Rule 609(a)(1) restores the intent of the House.

In the Senate, the Judiciary Committee heard from witnesses and correspondents favoring the House version, the Revised Draft, and the Supreme Court Draft. The Senate Committee agreed with the House limitation that only offenses involving false statement or dishonesty may be used. Senator McClellan proposed on the Senate floor an amendment reminiscent of the Supreme Court Draft in that it made all felony convictions and all falsity-based convictions of any kind admissible, and eliminated the power to exclude any of those convictions for unfair prejudice. McClellan's amendment was first rejected, and then, on reconsideration, narrowly approved. This left the Conference Committee with the task of reconciling the two versions of Rule 609(a) which, from all those proposed, defined the scope of admissibility most narrowly and most broadly. The narrow position was that only falsity-based convictions would be admissible, with no reference to judicial balancing. The broad version was that all felony convictions and all falsity-based convictions would be automatically admissible. The Committee compromised by making crimes involving dishonesty or false statement admissible with no discretion to exclude for unfair prejudice, while also making felony convictions for crimes not involving dishonesty or false statement admissible --- but only if probative value outweighed unfair prejudice "to the defendant." Thus there was a special protection intended for accused-witnesses, more protective than the Rule 403 test. Apparently exhausted, both houses acceded and enacted Rule 609(a).

### ***C. What Deference Should Be Given to the Legislative History?***

One could argue that a rule that went through so much fire and came out as a compromise should be given some deference before that compromise is undone. The exact amount of deference that should be given to a Congress that worked on this rule 50 years ago is subject to debate. Here are some possible arguments that cut against significant deference to the Congressional output:

#### ***1. The Rule has already been amended twice.***

The Great Compromise was one that ended up with a rule that made no sense in at least one respect. The language in the balancing test of Rule 609(a)(1) about prejudice "to the defendant" was intended to protect criminal defendants, but by its terms civil defendants were protected as well. This resulted in an imbalance in the impeachment rules in civil cases --- defendant-witnesses were protected by a balancing test but plaintiff-witnesses were not. The Supreme Court, in *Green v. Bock Laundry*, 490 U.S. 504 (1989), rejected this literal interpretation as being nonsensical, and called upon rulemakers to rectify the anomaly. A 1990 amendment to Rule 609(a)(1) limited the balancing test of "probative value must outweigh the prejudice" to *criminal* defendants who are testifying. And it also made clear that Rule 403 applied to non-falsity convictions offered against any witness other than a criminal defendant.

But the rule had another infirmity as well --- the line between crimes that were automatically admissible under Rule 609(a)(2) and those admissible after balancing under Rule 609(a)(1) was vaguely drawn. In particular, the rule was unclear on whether a trial court could go behind the conviction and admit it under Rule 609(a)(2) if the court found that the witness lied in some way in the course of committing a crime. Such a process was nonsensical because it ended in a finding

that the crime (such as murder) was more probative of untruthfulness if the witness lied to commit it --- but the jury (the body that is supposed to be deciding credibility) would never know this because they would only be told what the conviction was, not how it was committed. So the Rule was amended in 2006 to clarify that the court must in virtually all cases look only at the elements of the conviction and not try to speculate on how it was committed.

So the Great Compromise Rule was not a model of rule-drafting, and the fact that it has been amended twice --- substantive changes, not counting a major facelift in the restyling--- shows that it is hardly an untouchable.

## ***2. The Congressional View is a Muddled One***

As shown above, the House favored a version of Rule 609 that would actually be the law if Rule 609(a)(1) is abrogated. The Senate Judiciary Committee agreed with that position, and Senator McLellan's attempt to reject it was itself rejected at first, and then narrowly adopted on reconsideration. So it is not like there is a uniformly held congressional position in favor of Rule 609(a)(1).

## ***3. Many More Defendants Are Subject to Prior Conviction Impeachment Today***

Empirical data indicates that there are many more defendants with prior convictions today than previously. The data is not a perfect fit for comparing the rates in 1975 and today. Kalven and Zeisel surveyed criminal trials in a number of American jurisdictions in 1955 and found that 42% of trial defendants had a felony record and 82% testified.<sup>3</sup> By 2001, the National Center for State Courts reported that 76% of defendants had a felony record and only 50% testified. The data is consistent with the undisputed fact that the number of incarcerated defendants has increased over the last 30 years. So the opportunities for impeachment with prior convictions is likely to be much greater than at the time of the Great Compromise. It is also the case that the burden of impeachment falls disproportionately on defendants of color, as they are more likely to have a criminal record than white defendants. It is at least arguable that if Congress had envisioned the frequency with which prior convictions were going to be used against criminal defendants, and disproportionately against persons of color, a different compromise might have been reached.

## ***4. An Amendment That Restores Protection to the Criminal Defendant Might Be Considered to Be Consistent with Congressional Intent.***

Another possible way to think about the legislative history is that even as a compromise, there was a special attempt to protect criminal defendants as witnesses. If that protection is not working out --- if criminal defendants are being impeached too easily, or being kept off the stand too broadly

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<sup>3</sup> Kalven & Zeisel, *The American Jury* at 144 (2d ed. 1971).

--- then perhaps the balance struck could be rethought. These matters are discussed in the following sections.

## II. State Variations

A number of states have rules that provide for greater protection from impeachment with convictions than does the Federal Rule.

### 1. *Alaska Rule 609(a)*:

**(a) General Rule.** For the purpose of attacking the credibility of a witness, evidence that the witness has been convicted of a crime is only admissible if the crime involved dishonesty or false statement.

**Comment:** Alaska bars impeachment with non-falsity convictions, and appears to allow discretionary exclusion of falsity-based convictions, because admission of such convictions is not mandatory under the terms of the rule.

### 2. *Hawaii Rev. Stat. Ann. §626-1, Rule 609(a)*:

For the purpose of attacking the credibility of a witness, evidence that the witness has been convicted of a crime is inadmissible except when the crime is one involving dishonesty. However, in a criminal case where the defendant takes the stand, the defendant shall not be questioned or evidence introduced as to whether the defendant has been convicted of a crime, for the sole purpose of attacking credibility, unless the defendant has oneself introduced testimony for the purpose of establishing the defendant's credibility as a witness, in which case the defendant shall be treated as any other witness as provided in this rule.

**Comment:** This rule goes even further than abrogating Rule 609(a)(1). It also abrogates Rule 609(a)(2), at least as applied to criminal defendants who are witnesses (unless they open the door).

### 3. *Kansas Stat. Ann. § 60-421*:

Evidence of the conviction of a witness for a crime not involving dishonesty or false statement shall be inadmissible for the purpose of impairing his or her credibility. If the witness be the accused in a criminal proceeding, no evidence of his or her conviction of a crime shall be admissible for the sole purpose of impairing his or her credibility unless the witness has first introduced evidence admissible solely for the purpose of supporting his or her credibility.

**Comment:** Kansas abrogates Rule 609(a)(1) as to all witnesses, and prohibits *any* impeachment of criminal defendants with prior convictions.

#### **4. Michigan Rule of Evidence 609:**

**(a) General Rule.** For the purpose of attacking the credibility of a witness, evidence that the witness has been convicted of a crime shall not be admitted unless the evidence has been elicited from the witness or established by public record during cross-examination, and

(1) the crime contained an element of dishonesty or false statement, or

(2) the crime contained an element of theft, and

(A) the crime was punishable by imprisonment in excess of one year or death under the law under which the witness was convicted, and

(B) the court determines that the evidence has significant probative value on the issue of credibility and, if the witness is the defendant in a criminal trial, the court further determines that the probative value of the evidence outweighs its prejudicial effect.

**Comment:** As compared to Federal Rule 609(a)(1), Michigan covers only one set of crimes --- those that contain an element of theft. Michigan is saying that theft-related crimes are more likely to be probative of a character for truthfulness than, say, violent crimes.

#### **5. Montana Rule of Evidence 609:**

For the purpose of attacking the credibility of a witness, evidence that the witness has been convicted of a crime is not admissible.

**Comment:** Montana abrogates Rule 609 entirely. The Montana Advisory Commission “does not accept as valid the theory that a person’s willingness to break the law can automatically be translated into willingness to give false testimony.”

#### **6. Pennsylvania Rule of Evidence 609:**

**(a) In General.** For the purpose of attacking the credibility of any witness, evidence that the witness has been convicted of a crime, whether by verdict or by plea of guilty or *nolo contendere*, must be admitted if it involved dishonesty or false statement.

**Comment:** Pennsylvania has no Rule 609(a)(1) at all. The entire rule is 609(a)(2). The Pennsylvania Advisory Committee explains that the variance from Federal Rule 609 is to account for pre-existing Pennsylvania case law.

It should be noted, though, that the Pennsylvania Rule’s bar on Rule 609(a)(1) is by inference only. It doesn’t specifically say that such convictions are inadmissible. It only says what is admissible, and so relies on the maxim *expression unis exclusion alterius*. As a matter of good rulemaking --- and especially given the existing structure of the Federal Rule --- it would definitely

be better to add a specific statement that non-falsity based convictions are inadmissible to impeach a witness's character for truthfulness. That option is explored below in the drafting alternatives.

### **7. West Virginia Rule 609(a)**

#### **(a) General Rule.**

(1) *Criminal Defendants.* For the purpose of attacking the credibility of a witness accused in a criminal case, evidence that the accused has been convicted of a crime shall be admitted but only if the crime involved perjury or false swearing.

(2) *All Witnesses Other Than Criminal Defendants.* For the purpose of attacking the credibility of a witness *other than the accused*:

(A) evidence that the witness has been convicted of a crime shall be admitted, subject to Rule 403, if the crime was punishable by death or imprisonment in excess of one year under the law under which the witness was convicted, and

(B) evidence that the witness has been convicted of a crime shall be admitted if it involved dishonesty or false statement, regardless of the punishment.

**Comment:** West Virginia replicates the Federal Rule as to all witnesses other than the criminal defendant. It abrogates Rule 609(a)(1) as applied to criminal defendants. And it does so specifically, rather than passively as in Pennsylvania. It specifically says that *only* falsity-based convictions are admissible against the accused.

### **III. Unpacking the Arguments Against Rule 609(a)(1)**

There are two foundational arguments expressed in favor of abrogating Rule 609(a)(1): First, convictions that do not involve dishonesty or false statement are only minimally probative of whether a person will lie under oath. Second Rule 609(a)(1) is often applied so broadly that it has a very negative impact on a criminal defendant's exercise of the right to testify, and may well result in the defendant deciding not to go to trial at all. These two foundational assumptions will be discussed immediately below. After that there is a discussion of empirical studies that might be pertinent to these foundational questions, and a discussion of case law applying the Rule 609(a)(1) balance.

#### ***A. Minimal Probative Value of Non-Falsity Convictions?***

As Judge Rice notes, the traditional reason for allowing impeachment with non-falsity based prior convictions is that a person who has been convicted of such a crime is thought to have shown a willingness to place his own interests above those of society. That disregard of societal interests is considered probative of the witness's willingness to disregard the oath and testify falsely. To

state the extreme hypothetical, a witness who has been convicted of several murders is unlikely to worry much about laws on telling the truth.

Judge Rice notes that some research indicates that “moral conduct in one situation is not *highly* correlated with moral conduct in another” (emphasis added), and it is surely true that the probative value of a non-dishonesty conviction is less than that of a falsity-based conviction. Federal courts have often noted and emphasized that convictions not involving dishonesty or false statement are significantly less probative for impeachment. For example, in *United States v. Walker*, 974 F.3d 193 (2nd Cir. 2020), the defendant argued that the trial court was in error for refusing to allow the defendant to impeach a government witness with prior convictions for assault. The trial court reasoned that “[i]t is dubious whether the convictions are relevant as assault does not shed light on veracity.” The court of appeals found no error because the conviction “did not involve dishonesty, and so shed little light on veracity.” The court relied on its decision in *United States v. Estrada*, 430 F.3d 606, 617-19 (2d Cir. 2005), in which the court provided the “rule of thumb” that “convictions which rest on dishonest conduct relate to credibility whereas those of violent or assaultive crimes generally do not.” The *Walker* court concluded that that “violent crimes, however abhorrent, often are not crimes of dishonesty, and may not meaningfully reflect on a witness’s truthfulness.”

With respect to criminal defendants who wish to testify, there is a strong argument that the minimal probative value of a Rule 609(a)(1) conviction is even further reduced. That is because the conviction’s probative value must be assessed in light of the fact that a criminal defendant, upon taking the stand, *is already suffering impeachment of credibility*. The real question is the *marginal* probative value of the conviction after it is considered that the defendant has a motive to falsify in order to avoid conviction of the crime *charged*.

As Professor Bellin points out: “Rule 609 admits prior convictions to suggest that the witness might lie under oath. But for criminal defendants, the pressure to lie created by the prospect of incarceration already establishes that point beyond doubt. And the defendant’s self-interest in liberty is many orders of magnitude greater than any hypothetical dishonesty-inducing character flaw revealed by a prior conviction.”<sup>4</sup>

Professor Friedman assesses the marginal, minimal, probative value of prior convictions of a criminal defendant through a juror’s internal discussion at the end of a case (tweaked by the Reporter): “At first I thought it was very unlikely that, if Defoe committed a murder, he would be willing to lie about it. But now that I know he committed a drug crime, that possibility seems

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<sup>4</sup> In *Old Chief v. United States*, 519 U.S. 172 (1997), the Court holds that the probative value of proffered evidence must be considered in light of evidentiary alternatives. The Court states that the probative value of evidence is diminished if there is an equally probative and less prejudicial alternative. With criminal defendant witnesses, the probative value of the conviction is reduced because impeachment for bad motive is even more probative (a stronger form of impeachment) and less prejudicial. (The Supreme Court noted in *Olden v. Kentucky*, 488 U.S. 227 (1988) that bad motive impeachment is the strongest form of impeachment).



substantially more likely.”<sup>5</sup> See also *People v. Allen*, 429 Mich. 558, 603 (1988) (“When a criminal defendant testifies jurors are quite aware that he has a unique concern with the outcome of the trial and is more likely to have fabricated his testimony than any other witness. His testimony is therefore likely to be given diminished weight irrespective of impeachment.”).

And yet federal courts, based on the case law digest attached to this memo, generally do not consider the marginal probative value of a prior conviction. The probative value is considered as it would be with any other witness, without taking into account that the accused is inherently self-impeached due to his motive to falsify. Thus, it would appear that Congress, and the courts, have left a gaping hole in the analysis of probative value, resulting in the admission of many more convictions than is justified by a proper analysis of credibility. A proper analysis would be one that takes account of all the forms of impeachment that are working against the defendant.

Surely if a criminal defendant has made a prior inconsistent statement, and has been convicted of perjury eight times, a court will take these forms of impeachment into account and find that piling on with a conviction that is not even based on falsity is unjustified --- i.e., the marginal probative value does not outweigh the prejudicial effect (especially if the conviction is similar to the charged crime). The case digest indicates that many courts indeed evaluate the marginal probative value of Rule 609(a)(1) convictions when the defendant has *other convictions* that are going to be automatically admissible. See, e.g., *United States v. Cunningham*, 2012 WL 12865641 (W.D. Mich. 2012) (conviction for escape not admissible where the defendant had six previous dishonesty crimes that were automatically admissible to impeach him under Rule 609(a)(2); the existence of these impeaching offenses lowered the probative value of the escape felony). If marginal probative value is considered when there are *other* forms of impeachment, then why do courts not consider the most important form of impeachment --- motive to falsify --- as part of the marginal probative value analysis? The Supreme Court has declared that the exposure of a witness’s motivation to falsify is a “proper and important” mode of impeachment. *Davis v. Alaska*, 415 U.S. 308, 316 (1974). See also *Olden v. Kentucky*, 488 U.S. 227, 232 (1988) (evidence of motive to falsify carries a “strong potential to demonstrate the falsity” of a witness’s testimony). It is surely the case that a motive to falsify in a particular case is more probative of credibility than an attack on character for truthfulness under Rule 609(a)(1), which relies on the debatable propositions that: 1. Violating a law not dependent on falsity is probative of a propensity to lie under oath; and 2. The character trait is so strong that it overcomes the deterrent effect of a possible perjury prosecution (not to speak of the risk that the judge will find that defendant lied and take that into account in sentencing).

Acceptance of the above argument --- that courts are evaluating the probative value of a prior conviction without considering its marginality in light of the defendant’s motive to falsify --

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<sup>5</sup> Friedman, *Character Impeachment Evidence: Psycho-Bayesian Analysis and a Proposed Overhaul*, 38 U.C.L.A. L. Rev. 637 (1991).

- can lead to the conclusion that the Compromise balancing test is less protective than Congress might have contemplated.

### ***B. Deterrence of the Constitutional Right to Testify?***

Beyond the attack on probative value, a second prong of the critique on Rule 609(a)(1) --- emphasized by Judge Rice and other scholars --- is the concern that the threat of overuse of prior convictions deters many criminal defendants from testifying. That concern has received fuel from a study done of all the defendants who have been exonerated by DNA testing. It turns out that 39% of them did not testify, and 91% of that non-testifying group had prior convictions that would probably have been admissible, or were ruled to be admissible, under broad impeachment rules like Rule 609(a). John Blume, *The Dilemma of the Criminal Defendant with a Prior Record--Lessons from the Wrongfully Convicted*, 5 J. Empirical Legal Stud. 477, 484-86 (2008) (“In almost all instances in which a defendant with a prior record did not testify, counsel for the wrongfully convicted defendant indicated that avoiding impeachment was the principal reason the defendant did not take the stand.”). Another study of criminal cases throughout the country, conducted in the 1970’s by Professor Myers, found that 62% of defendants without criminal records testified while 45% of those with criminal defendants testified.

There are some caveats to this data. First, it is not determined whether the convictions in those cases would be admissible anyway under Rule 404(b) --- if they were, then there must have been some other reason for the defendant to decide not to testify, because testifying would have added no new prejudice. Second, there are many reasons for a defendant not to testify --- most notably the fear of cross-examination --- and nothing in the study rules out alternative causes. Third, there is no showing that the convictions were not-falsity based --- if they were falsity-based, then Rule 609(a)(1) is not the problem.

All that said, it is hard to deny that the risk of impeachment with prior convictions could have had an effect on the decision not to testify in some of the cases. *See also* Gordon Van Kessel, *Adversary Excesses in the American Criminal Trial*, 67 Notre Dame L. Rev. 403, 482 (1992) (noting that “[t]he threat of felony conviction impeachment can be a powerful deterrent to taking the witness stand” and citing empirical evidence that “a defendant [i]s almost three times more likely to refuse to testify if he ha[s] a criminal record than if not”). As the Federal Public Defender pointed out at the last meeting, it is common practice to encourage a witness not to testify if that would make prior convictions admissible.

Attached to this memo is a report by the Federal Public Defender, showing the results of a survey on whether defendants choose not to testify because of impeachment under Rule 609(a)(1). This survey, and the written comments to the survey, at the least provides substantial anecdotal evidence that Rule 609(a)(1) does work to prevent defendants from exercising their right to testify.

Another obvious point should be stated: If defendants are scared off the stand by Rule 609(a)(1) impeachment, then a likely result in many cases is that they will plead guilty rather than

go to trial. Those concerned with the “vanishing trial” need to look at broad impeachment under Rule 609(a)(1) as a contributing cause.

### ***C. Empirical Data on the Prejudicial Impact of Prior Convictions***

Professor Michael Saks has submitted a summary of empirical studies that, according to Professor Saks, “inquire into the impact of prior convictions on jurors’ thinking about the case at bar, and the (apparent lack of) impact of limiting instructions directing jurors to employ the prior conviction evidence for the purposes of assessing credibility and not for the purpose of estimating the probability that the defendant committed the crime currently charged.” Some of the data also indicates that the threat of impeachment deters defendants from testifying. What follows is the summary provided by Professor Saks to the Reporter, with some additions and comments:

#### **Correlational Analyses of Actual Trials**

Kalven and Zeisel, *The American Jury* (1966).

Drawing on data from 3576 trials from state courts around the U.S., observed that conviction rates were 27 percent higher for cases in which prior conviction evidence was presented than for those cases in which such evidence was not presented.

Eisenberg & Hans, *Taking a Stand On Taking the Stand: The Effect of a Prior Criminal Record On the Decision to Testify and On Trial Outcomes*, 94 *Cornell L. Rev.* 1353 (2009).

From a database compiled by the National Center for State Courts, statistical analysis of 382 actual trials in four large counties around the U.S. in which prior crimes were at issue in the decision of a defendant whether to testify; finding statistically significant associations (1) between the existence of a criminal record and the decision to testify at trial, (2) between the defendant’s testifying at trial and the jury’s learning about the defendant’s prior record, and (3), in cases with weak evidence, between the jury’s learning of a criminal record and conviction (from under 20% to over 50%); in cases with strong evidence against defendants, learning of criminal records is not strongly associated with conviction rates; finding little evidence that prior record information causes reduction in credibility assessments; authors conclude from the pattern of findings that that criminal records are relied on to convict when other evidence in the case normally would not support conviction.

#### **Mock Juror and Jury Experiments Simulating Criminal Cases**

Doob & Kirshenbaum, *Some Empirical Evidence on the Effect of s. 12 of the Canada Evidence Act Upon an Accused*, 15 *Crim. L.Q.* 88 (1972).

Mock juror (non-deliberating individuals) experiment; individuals were recruited from various locations in Toronto; finding increase in rate of convictions when jurors were aware of a prior conviction for a similar crime; limiting instructions did not prevent the effect.

Cornish & Sealy (L.S.E. Jury Project), *Juries and the Rules of Evidence*, 1973 *Crim. L. Rev.* 208.

Mock jury (deliberating groups) experiments in England using 646 community members; finding an increase in the proportion of guilty verdicts in a theft case and (for one of two defendants) in a rape case when jurors learned of a defendant's previous record for crimes similar to that charged; when prior conviction was for a dissimilar crime, no increase in conviction rate occurred.

Hans & Doob, Section 12 of the Canada Evidence Act and the Deliberations of Simulated Juries, 18 *Crim. L.Q.* 235 (1976).

Mock jury experiment in Canada involving 160 residents or visitors to the Toronto area (of whom 40 were University of Toronto students), deliberating as 4-person juries; finding that jurors who learned that the defendant had previously been convicted of the same crime were significantly more likely to find the defendant guilty than were jurors who had no information about his prior record.

Wissler & Saks, On the Inefficacy of Limiting Instructions: When Jurors Use Prior Conviction Evidence to Decide on Guilt, 9 *Law & Hum. Behav.* 37 (1985).

Mock juror experiment using 160 adults recruited from various locations in Boston; finding that evidence of similar prior crime increased conviction rate compared to no prior crime or dissimilar prior; also, *same-crime prior led to higher rate of convictions than did a prior for perjury; on measures of witness credibility, defendants were invariably rated the lowest, and those ratings were unaffected by prior conviction information*, including prior conviction for perjury; despite judges' instructions regarding proper use of prior conviction evidence, the defendant's "credibility was not significantly higher with no prior conviction nor lower with a prior conviction for perjury" and the "credibility rating of the defendant was significantly lower" than that of all other witnesses. *The mock jurors used prior conviction evidence to "help them judge the likelihood that the defendant committed the crime charged" in spite of limiting instructions.* Most telling was the fact that a higher conviction rate was found where, all else being the same, the impeaching crime was murder than where the impeaching crime was perjury. The only explanation for this last result is that the prior conviction evidence was not used exclusively to evaluate credibility. This is emphasized by the fact that the researchers found that there was no significant difference between the mock jurors' ratings of defendant's credibility when a prior conviction was introduced and when one was not. They concluded that "[t]he credibility ratings of defendant did not vary as a function of prior conviction," while "[c]onviction rates [did vary] as a function of prior conviction...."

**Note: This study seems to support the proposition that jurors are aware that the defendant has a motive to falsify and that impeachment with prior convictions simply**

**adds prejudicial effect without much corresponding value as to credibility. It also shows that limiting instructions are not effective in limiting prejudice.**

Greene & Dodge, *The Influence of Prior Record Evidence on Juror Decision Making*, 19 *Law & Hum. Behav.* 67 (1995).

Mock jury experiment using adult participants recruited from persons called for jury duty in Colorado; jurors were more likely to convict if they learned of a prior conviction, compared to a prior acquittal or no conviction information at all; *17% of mock jurors convicted the accused based on just the facts, while 40% convicted when in addition they learned of the defendant's prior record; limiting instructions by the judge were ineffective in bringing about legally proper use of the prior record evidence.*

Lloyd-Bostock, *The Effects on Juries of Hearing about the Defendant's Previous Criminal Record: A Simulation Study*, 2000 *Crim. L. Rev.* 734.

British mock jury experiment; varied the presence, similarity, and recency of prior convictions; finding that jurors who learned of a recent similar conviction rated the probability that the defendant committed the crime as higher, estimating the probability of guilt as 66% compared to 52% for those who did not hear of the prior; recent similar convictions increased the likelihood of conviction and dissimilar convictions showed a comparative decline; knowing of prior conviction versus control did not affect credibility ratings (however, jurors who learned of a recent dissimilar record said that they were more likely to believe the defendant than jurors in any of the other conditions); most assumed that defendants probably had prior convictions even if no evidence or priors was given; author suggests the different patterns for similar and dissimilar prior convictions imply that jurors primarily use criminal-record evidence to infer propensity rather than to assess credibility.

***In addition to the studies cited by Professor Saks, there is a more recent study, by Professor Bellin, on the impact of Rule 609(a)(1):***

Professor Bellin conducted a mock juror study --- a simulated trial of a defendant for breaking into a store and stealing jewelry. The simulation was designed and pilot-tested to suggest guilt, but not conclusively. Four scenarios were presented: 1. The defendant did not testify and no prior convictions were introduced; 2. The defendant testified and was not impeached; 3. The defendant testified and was impeached with a fraud conviction; and 4. The defendant testified and was impeached with a robbery conviction (i.e., similar to the crime charged). (Thus this test eliminates the impact that might come from Rule 404(b), as the conviction is introduced solely for impeachment. And it separates out the impact from Rule 609(a)(2), as it shows the difference when a defendant is impeached with a fraud conviction and when a defendant is impeached with a robbery conviction). Limiting instructions were provided to prohibit a "bad person" inference when impeachment evidence was admitted, and to avoid drawing a negative inference from the defendant's decision not to testify when that was the case.

The results were that the jurors convicted most often when they heard about the robbery conviction. (82% of the cases). Where the defendant did not testify and no conviction was introduced, he was convicted in 76% of the cases. Where the defendant testified and was impeached with a fraud conviction, he was convicted in 73% of the cases. And where the defendant testified free of impeachment he was convicted in 62% of the cases.

***The apparent conclusions from the Bellin study are:***

1. There is significant prejudicial effect when the defendant is impeached with a crime similar to that charged; that is, a similar conviction has an effect that outstrips probative value --- the robbery conviction was more outcome-determinative than the fraud conviction even though it was less probative.

2. Limiting instructions are of little to no effect.<sup>6</sup>

3. There is a silence penalty for failure to testify. Defendants were slightly worse off when they didn't testify than when they testified subject to a Rule 609(a)(2) conviction. Beyond this mock trial study, Professor Bellin cites a lot of further data on the existence of a silence penalty -- post-trial interviews with jurors, and a number of other mock trial studies. The takeaway point is that criminal defendants are put in a box --- if they avoid taking the stand because of the threat of impeachment, they are subject to suffering a prejudicial inference that is roughly as powerful as the conviction they are trying to avoid.

***D. Case Law on Rule 609(a)(1)***

The appellate case law on Rule 609(a)(1) shows some cases in which the accused received the full protection of the more protective balancing test, and a somewhat larger number in which impeachment has probably been broader than Congress would appear to have intended. There is a reasonable possibility for appellate relief where the conviction offered for impeachment is similar to the crime charged and not highly probative of truthfulness, or where the conviction is for conduct that is especially inflammatory. *See, e.g.:*

• *United States v. Caldwell*, 760 F.3d 267 (3<sup>rd</sup> Cir. 2014) (prior felon-firearm conviction could not be admitted to impeach the accused in a felon-firearm prosecution).

• *United States v. Sanders*, 964 F.2d 295 (4<sup>th</sup> Cir. 1992) (error to admit evidence of prior convictions for assault and contraband possession in a prosecution for assault with a dangerous weapon).

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<sup>6</sup> *See also* Dodson, *What Went Wrong with FRE Rule 609: A Look at How Jurors Really Misuse Prior Conviction Evidence*, 48 Drake L.Rev. 1, 31 (1999) (describing empirical data based on mock trials and post-trial juror interviews indicating that the limiting instructions given regarding prior convictions offered to impeach are generally not understood and rarely followed).

- *United States v. Martinez*, 555 F.2d 1273 (5<sup>th</sup> Cir. 1977) (error to admit prior narcotics conviction in a prosecution for conspiracy to distribute cocaine).

- *United States v. Kemp*, 546 F.3d 759 (6<sup>th</sup> Cir. 2008) (error to admit prior convictions for taking indecent liberties with a minor in a prosecution for felon-firearm possession).

- *United States v. Bagley*, 772 F.2d 482 (9<sup>th</sup> Cir. 1985) (error to admit prior robbery convictions in a prosecution for bank robbery).

On the other hand, there are many more examples in reported appellate cases in which prior convictions have been found properly admitted against an accused under Rule 609(a)(1), even when the conviction is identical to the crime charged, and sometimes when the conduct is especially inflammatory. *See, e.g.:*

- *United States v. Tracy*, 36 F.3d 187 (1<sup>st</sup> Cir. 1994) (in an armed robbery prosecution it was permissible to impeach the defendant with convictions for aggravated assault and stolen firearms, because the accused's credibility was important).

- *United States v. Shaw*, 701 F.3d 367 (5<sup>th</sup> Cir. 1983) (prior convictions for rape and assault were properly admitted to impeach a defendant in a murder prosecution).

*United States v. Walli*, 785 F.3d 1080 (6<sup>th</sup> Cir. 2015) (in a prosecution for injury government property the defendants were properly impeached with the prior convictions for injuring government property).

- *United States v. Hernandez*, 106 F.3d 737, 740 (7<sup>th</sup> Cir. 1997) (acknowledging that similarity of prior conviction to the charged offense was “a factor that requires caution” but concluding that it was outweighed by “the importance of the credibility issue in this case”).

- *United States v. Headbird*, 461 F.3d 1074 (8<sup>th</sup> Cir. 2006) (prior convictions for violent felonies were properly admitted to impeach a defendant in a felon-firearm prosecution: “One who has transgressed society's norms by committing a felony is less likely than most to be deterred from lying under oath.”).

- *United States v. Givens*, 767 F.2d 574 (9<sup>th</sup> Cir. 1985) (no error to admit prior robbery convictions to impeach the defendant in a prosecution for armed robbery).

- *United States v. Alexander*, 48 F.3d 1477 (9<sup>th</sup> Cir. 1995) (prior robbery conviction properly admitted to impeach the defendant in a bank robbery prosecution).

- *United States v. Smith*, 10 F.3d 724 (10<sup>th</sup> Cir. 1993) (prior convictions for robbery and burglary were properly admitted to impeach the defendant in a bank robbery prosecution).

- *United States v. Harris*, 720 F.2d 1259 (11<sup>th</sup> Cir. 1983) (prior drug convictions properly admitted to impeach the defendant in a drug prosecution).

It should be noted that it is relatively rare for negative Rule 609 rulings in the trial court to be appealed by an accused. That is because the negative ruling ordinarily occurs *in limine*, and in order to preserve the claim of error the defendant must actually testify and be impeached with the conviction on cross-examination. *Luce v. United States*, 469 U.S. 38 (1984) (defendant who does not testify waives the right to complain about an *in limine* ruling holding prior convictions to be admissible); *Ohler v. United States*, 529 U.S. 753 (2000) (defendant who raises an objectionable prior conviction on direct examination waives the right to complain that its admission was error). It appears that in many cases, if the trial court rules *in limine* that a conviction will be admissible to impeach him should he testify, the defendant decides not to testify, and an appellate court never reviews the trial court's ruling.

In the district courts, where there are reported decisions, there is also good and bad, careful and not careful. The attached case digest shows a pretty large number of cases in which the courts have found convictions admissible even though they should be considered on the less probative end of the Rule 609(a)(1) scale --- like drug crimes, crimes of violence and sexual offenses. And in many cases, the convictions found admissible are very similar to the crime charged. *See, e.g., United States v. Boyajian*, 2016 WL 225724 (C.D. Cal. 2016) (sex offense conviction admissible to impeach the defendant's trial testimony in a sexual offense case). There is a good argument that these courts have failed to apply the more protective Rule 609(a)(1) test properly.

The Rule 609(a)(1) balancing test, as applied in most courts, looks at the following factors:

(1) the kind of crime involved (including its probative value as to witness-truthfulness and its similarity to the charged crime); (2) when the conviction occurred; (3) the importance of the defendant's testimony to the case; and (4) the importance of the credibility of the defendant.

*United States v. Caldwell*, 760 F.3d 267 (3<sup>rd</sup> Cir. 2014). *See also United States v. Mahone*, 537 F.2d 922 (7<sup>th</sup> Cir. 1976) (using the same factors but splitting up the first factor into two --- probative value as to credibility and similarity of the crime --- and thus applying five factors).

A major problem with the balancing test is that two of the factors seem to cancel each other out, in cases where the criminal defendant's testimony would be important to the resolution (which is surely most cases). On the one hand, the court must factor in that importance as a factor toward exclusion, because there is an interest in having the accused testify. But on the other hand, the credibility of the accused is very important (given the importance of his testimony) and that is a factor cutting in favor of admitting the prior conviction.<sup>7</sup> The court in *Caldwell, supra*,

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<sup>7</sup> See Jeffrey Bellin, *Circumventing Congress: How the Federal Courts Opened the Door to Impeaching Criminal Defendants with Prior Convictions*, 42 U.C. Davis L.Rev. 289, 318 (2008) ("In essence, the factors cancel each other out. To the extent the defendant's testimony is 'important' \* \* \* his credibility becomes 'central' in equal degree, leading to a curious equipoise.").



“acknowledge[d] the tension” between these two factors, but continued to apply them --- as do other federal courts.<sup>8</sup>

In most cases in the case digest and on appeal, the two factors are in fact *not* applied to cancel each other out. Most cases emphasize the importance of the witness’s credibility; and in some cases that is in fact the *only* factor that the court relies on in allowing impeachment of the accused. *See, e.g., United States v. Cooper*, 990 F.3d 576 (8th Cir. 2021) (in a drug prosecution, a prior conviction for aggravated assault was properly admitted; the only factor relied upon by the court was that the defendant’s credibility was important, because his testimony contradicted that of the government’s witnesses --- when would that not be the case?); *United States v. Tolliver*, 374 Fed. Appx. 655, 658 (7th Cir. 2010) (drug distribution case: “Here, Toliver’s testimony and credibility were central to the case \* \* \* . Thus, although the similarity of [Toliver’s] two [drug distribution] crimes increased the risk of prejudice, the importance of Toliver’s credibility weighed in favor of admissibility.”); *United States v. Perkins*, 937 F.2d 1397, 1406 (9th Cir. 1991) (“In this case, defendant’s credibility and testimony were central to the case, as Perkins took the stand and testified that he did not commit the [bank] robbery. We therefore conclude that the district court did not abuse its discretion in denying Perkins’s motion to preclude the government from asking him about his recent prior conviction for bank robbery.”); *United States v. German*, 2023 WL 1466609, at \*1 (11th Cir. 2023) (“A criminal defendant who chooses to testify places his credibility in issue as does any witness; therefore, he is subject to impeachment through evidence of prior convictions.”).

Finally, and most importantly, it is fair to state that few if any of the cases in the case law digest assess convictions offered for impeachment in terms of their *marginal* probative value in light of the fact that the defendant’s credibility is already impaired by his obvious motive to falsify. That means by definition that many convictions currently admitted are being assigned more probative value than they actually have, leading to incorrect determinations under Rule 609(a)(1).

#### **IV. Questions About the Scope of An Amendment**

Assuming for now that Rule 609(a)(1) should be limited in some way, there are questions about how far any amendment should extend. This section discusses some of those questions.

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<sup>8</sup> It can also be argued that the ruling in *Luce, supra* --- that only defendants who testify can appeal impeachment- by-conviction rulings --- renders the third factor (importance of the witness’s testimony) nonsensical on appeal. That factor is designed to get the court thinking about not deterring the accused from testifying. But at the appellate level, only those defendants who *have* testified will be able to appeal. How does an appellate court apply the deterrence factor to a situation where, by definition, the accused was not deterred from testifying? See Bellin at 323: “Even if the trial court considers the defendant’s testimony to be of critical importance to the jury, it no longer follows that impeachment should be rejected on that ground. The jury will hear the defendant’s testimony (in fact, has already heard that testimony) regardless of whether the trial court admits the impeachment for use in cross-examination.”

## ***A. Impeaching Other Witnesses***

The focus of the scholarly attacks on Rule 609 has always been impeachment of criminal defendants with their prior convictions --- and that was also the focus of Congress. Should Rule 609(a)(1) be eliminated as to other witnesses as well? This is really two separate questions: 1) Should the rule be abrogated as to prosecution witnesses?; and 2) Should the abrogation extend to civil cases?

### ***1. Prosecution Witnesses:***

One consequence of total elimination would be that criminal defendants will no longer be able to impeach government witnesses with convictions that are now admissible under Rule 609(a)(1). The extent of that impact on impeachment of prosecution witnesses is a matter of debate. It is clear that even without Rule 609(a)(1), some convictions will remain admissible. Of course, the most probative convictions --- those that involve dishonesty or false statement --- will remain automatically admissible. But even non-falsity convictions would remain admissible if probative to impeach the prosecution's witnesses for bias. If the witness has been convicted on a lesser sentence as part of a deal with the government, the conviction will often be admissible to show a motive to falsify. So the impact of an abrogation is limited to the situation in which the conviction is non-falsity and is offered only to show a character trait for untruthfulness.

In some cases, it might be argued that even after an elimination of Rule 609(a)(1), the accused could argue that his constitutional right to confront witnesses would require the court to admit a non-falsity-based conviction to show character for untruthfulness. But those cases would be rare. Courts routinely uphold limitations on cross-examination and impeachment if they are reasonable. *See, e.g., United States v. Sanders*, 708 F.3d 976, 991 (7<sup>th</sup> Cir. 2013) (“a limitation on cross-examination implicates the core of the Confrontation Clause when the defense is completely forbidden from exposing the witness’s [credibility]”); *United States v. Domina*, 784 F.2d 1361, 1366 (9<sup>th</sup> Cir. 1986) (“Domina claims that the district court improperly limited his cross-examination of Purnell by not permitting the defense to explore whether drug use adversely affected Purnell’s credibility. The Sixth Amendment to the United States Constitution guarantees an accused in a criminal prosecution the right to cross-examine adverse witnesses. \* \* \* This right is subject to the broad discretion of a trial judge to preclude harassment or unduly prejudicial interrogation. \* \* \* The district judge did not abuse his discretion in balancing the probative value of the desired cross-examination against its potential prejudice, and the restriction of the cross-examination did not violate the confrontation clause of the sixth amendment.”). A constitutional argument is especially unpromising because the claim would be an inability to impeach a witness with a conviction that is not very probative of a character for untruthfulness in the first place.

In assessing the effect on defendants of an abrogation of Rule 609(a)(1) as to prosecution witnesses, it must be noted that the Rule, as applied by courts, has hardly been a broad path of admissibility. It appears from the reported cases that most defense attempts to offer non-falsity convictions against prosecution witnesses have been rebuffed. Here are some examples:

- *United States v. Walker*, 974 F.3d 193 (2nd Cir. 2020) (prior assault conviction was properly excluded because the conviction “did not involve dishonesty, and so shed little light on veracity”).
- *United States v. Jackson*, 549 F.3d 963 (5<sup>th</sup> Cir. 2008) (convictions for sexual assault were properly excluded, because the jurors would have “improperly discounted his testimony because of personal revulsion for sex offenses”).
- *United States v. Galati*, 230 F.3d 254 (7<sup>th</sup> Cir. 2000) (drug possession conviction of a prosecution witness was properly excluded; nothing about the conviction was probative of character for untruthfulness, and the likelihood of unfair prejudice was great).
- *United States v. Chaika*, 695 F.3d 741 (8<sup>th</sup> Cir. 2012) (no error in barring the defendant from impeaching a cooperating coconspirator with a conviction for felony sexual misconduct; the conviction did not involve a dishonest act or false statement, and the witness had already been impeached with his guilty plea to a lesser offense).
- *United States v. Begay*, 144 F.3d 1336 (10<sup>th</sup> Cir. 1998) (no error in barring impeachment with convictions for drugs, rape, and burglary; the convictions were not very probative of character for untruthfulness, and they were “potentially prejudicial in arousing sentiment against a witness”).

The end result of an elimination of Rule 609(a)(1), then, is likely to be some relatively minor loss of impeachment evidence. There are at least three arguments that justify this reduction in impeachment: 1) The fundamental argument for eliminating Rule 609(a)(1) is that it allows admission of convictions that are not probative of a witness’s willingness to commit perjury, and that argument applies as much to government witnesses as it does to criminal defendants; 2) The government can suffer unfair prejudice when Rule 609(a)(1) convictions are allowed as to government witnesses; and 3) Most importantly, a ban on impeachment of government witnesses makes an amendment more balanced and fair. Optics are important. If the cost of excluding the accused’s convictions is preventing the accused from impeaching government witnesses with the same convictions, it seems clear that criminal defendants would be good with paying that cost. Any doubt about that assertion could be established in the public comment.

## ***2. Witnesses for the Criminal Defense***

If government witnesses are to be freed from Rule 609(a)(1) convictions, it follows that the same protection should apply to witnesses called by the accused. Witnesses called by the accused raise the same issues as witnesses called by the government: while the constitutional right to testify is not at stake, there remains a risk that impeachment with non-falsity convictions is of low probative value, and admission of such convictions creates unfair prejudice as to the party that called the witness.

Accordingly, the draft of the proposed amendment, set forth below, prohibits the use of Rule 609(a)(1) in criminal cases.

### 3. Civil Cases

In all the hubbub about Rule 609, very little is ever said about its use in civil cases. (Indeed, as discussed above, Congress drafted Rule 609(a)(1) without any thought of its impact in civil cases). If Rule 609(a)(1) is completely abrogated, this would mean that witnesses in civil cases would be free from impeachment with assault convictions, drug convictions, etc.

It has been said that “[t]he question of whether to block impeachment by felony convictions for unfair prejudice is overwhelmingly a problem in criminal cases rather than civil cases.” Christopher B. Mueller, Laird C. Kirkpatrick & Liesa L. Richter, 3 Federal Evidence § 6:45 (4th ed. May 2021 update). This suggests that if Rule 609(a)(1) is eliminated from criminal cases, there is not much reason to keep its complexities around for civil litigation. Moreover, the fundamental point of lack of probative value, and problematic unfair prejudice, is equally applicable to civil and criminal litigation.

The reported civil cases under Rule 609(a)(1) mostly involve excessive force or prison injuries. *See, e.g., Donald v. Wilson*, 847 F.2d 1191 (6<sup>th</sup> Cir. 1988) (in an excessive force case, there was no error in admitting the plaintiff’s prior rape conviction to impeach his character for truthfulness); *Murr v. Stinson*, 752 F.2d 233 (6<sup>th</sup> Cir. 1985) (in an excessive force case, the sheriff was properly impeached with cocaine convictions); *Romanelli v. Suliene*, 615 F.3d 847 (7<sup>th</sup> Cir. 2010) (in a suit for the violation of a prisoner’s right to receive medical care, there was no error in admitting the prisoner’s prior convictions for sexual assault and bail jumping, to impeach him). To the extent these cases bear upon criminal-like issues, it seems odd to continue to apply Rule 609(a)(1) to such cases, if the Rule is eliminated from criminal cases.

Essentially, if it is concluded that the Rule is simply wrong --- because it allows admission of evidence of little to no probative value, at the expense of unfair prejudice through improper and inflammatory character inferences --- then there would be no good reason to continue applying Rule 609(a)(1) to civil cases. As one scholar noted, probative value of these convictions is low as to witnesses of all sorts, and impeachment of plaintiffs in civil rights cases may be seen as especially problematic.<sup>9</sup> This is of course a question for the Committee. It should be noted, though, that if Rule 609(a)(1) remains applicable to civil cases, it becomes challenging to write a Committee Note justifying that position -- because the reason for abrogating the rule, i.e., minimal probative value and significant prejudicial effect, is equally applicable to civil and criminal cases.

If the Committee decides that the Rule should be retained for civil cases, the amendment would read as follows:

**(a) In General.** The following rules apply to attacking a witness’s character for truthfulness by evidence of a criminal conviction:

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<sup>9</sup> Roberts, *Models and Limits of Federal Rule of Evidence 609 Reform*, 76 Vanderbilt L. Rev. 1880, 1885 (2024).

(1) for a crime that, in the convicting jurisdiction, was punishable by death or by imprisonment for more than one year, the evidence:

(A) must be admitted, subject to Rule 403, in a civil case, but it is not admissible in a criminal case or in a criminal case in which the witness is not a defendant; and

(B) ~~must be admitted in a criminal case in which the witness is a defendant, if the probative value of the evidence outweighs its prejudicial effect to that defendant; and~~

(2) for any crime regardless of the punishment, the evidence must be admitted if the court can readily determine that establishing the elements of the crime required proving—or the witness’s admitting—a dishonest act or false statement.

One of the major critiques of Rule 609(a)(1) is that it is so complicated and difficult to apply. In the above version, the rule remains complicated. It would be a much cleaner rule to eliminate Rule 609(a)(1) and have a single rule of admissibility for falsity-based convictions in all cases. Gone are all the balancing tests.

### ***B. The Impact on Rule 609(b)***

Assuming Rule 609(a)(1) is eliminated, a question arises about the impact of that elimination on convictions offered under Rule 609(b). Rule 609(b) covers old convictions—where it has been at least 10 years since the date of the conviction or confinement on the conviction, whichever is later. Congress rightly believed that old convictions are of less probative value in establishing the character of the witness testifying at the time of trial. Rule 609(b) provides that an old conviction is not admissible for impeachment unless its probative value substantially outweighs its prejudicial effect. This is a reverse-403 test, unlikely to be satisfied for the very reason that the probative value of a conviction declines with time.

If Rule 609(a)(1) were abrogated, a problem would arise if a non-falsity conviction, over 10 years old, could be admitted under Rule 609(b). For example, assume that an old assault conviction is found admissible under Rule 609(b). That would create an anomaly because, if there is no Rule 609(a)(1), the same conviction, if more recent, would be inadmissible. It cannot be that the chances of admissibility of a conviction *increase with age*. Therefore, any elimination of Rule 609(a)(1) needs to be paired with an assurance that non-falsity convictions would be inadmissible for impeachment under Rule 609(b).

It can be argued that the likelihood of a non-falsity conviction ever being admitted under Rule 609(b) should be nil --- especially when the court takes into account that the same conviction, if more recent, would be excluded if Rule 609(b)(1) is abrogated. By and large, the courts have limited admissibility under Rule 609(b) to those that, if more recent, would be automatically admissible under Rule 609(a)(2). *See, e.g., United States v. Brown*, 603 F.2d 1022 (1<sup>st</sup> Cir. 1979) (error to

admit old convictions for burglary and petit larceny against the testifying defendant);<sup>10</sup> *United States v. Payton*, 159 F.3d 49 (2<sup>nd</sup> Cir. 1998) (old conviction for false statement was properly admitted against the defendant’s witness); *United States v. Nguyen*, 542 F.3d 275 (1<sup>st</sup> Cir. 2008) (prosecution witness’s old conviction for breaking and entering was properly excluded); *United States v. Lochmondy*, 890 F.2d 817 (6<sup>th</sup> Cir. 1989) (old drug convictions of a prosecution witness were properly excluded); *United States v. Rucker*, 738 F.3d 878 (7<sup>th</sup> Cir. 2013) (old theft convictions were properly barred when offered to impeach a government witness; court notes that theft convictions are not automatically admissible under Rule 609(a)(2)); *United States v. Babb*, 874 F.3d 1027 (8<sup>th</sup> Cir. 2017) (prosecution witness’s convictions for escape, drug possession, and theft of property were not admissible to impeach him under Rule 609(a)(2) because that rule “severely limits the use of such evidence when the prior conviction is more than 10 years old); *United States v. Linn*, 31 F.3d 987 (10<sup>th</sup> Cir. 1994) (old convictions for larceny and stolen property were properly barred when offered to impeach a prosecution witness); *United States v. Pope*, 132 F.3d 684 (11<sup>th</sup> Cir. 1998) (28-year-old burglary conviction was not admissible to impeach a prosecution witness); *Wierstak v. Heffernan*, 789 F.2d 968 (1<sup>st</sup> Cir. 1986) (in a civil rights action for excessive force, the plaintiff’s old convictions for burglary and drugs were properly excluded, especially as the plaintiff was impeached in other ways); *Narkiewicz-Laine v. Doyle*, 930 F.3d 987 (7<sup>th</sup> Cir. 2019) (it was proper to impeach the plaintiff with his old conviction for lying to an FBI agent).

It turns out though, that there are some reported cases in which old convictions, not falsity-based, were found admissible under Rule 609(b). See, e.g., *United States v. Redditt*, 381 F.3d 597 (7<sup>th</sup> Cir. 2004) (a defendant charged with stealing mail was properly impeached with her old conviction for stealing electricity); *United States v. Brown*, 956 F.2d 782 (8<sup>th</sup> Cir. 1992) (in a drug prosecution, the defendant’s old burglary conviction was properly admitted under Rule 609(a)(2)); *United States v. Thomas*, 914 F.2d 139 (8<sup>th</sup> Cir. 1990) (17-year-old heroin possession conviction was properly admitted to impeach a defense witness); *United States v. Pritchard*, 973 F.2d 905 (11<sup>th</sup> Cir. 1992) (13-year-old burglary conviction was properly admitted to impeach the defendant in a bank robbery trial); *Schmude v. Tricam Industries*, 556 F.3d 624 (7<sup>th</sup> Cir. 2009) (old conviction for selling firearms without a license was properly admitted to impeach the plaintiff).

While the cases applying Rule 609(b) so expansively are ill-advised, given the strict balancing test, the fact is that non-falsity based convictions have been admitted under that rule. And that is just in the reported cases, meaning that there are undoubtedly unreported cases in which such impeachment occurs.

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<sup>10</sup> Note that, as will be discussed later, theft-related convictions are treated by almost all courts under Rule 609(a)(1). They are not automatically admissible under Rule 609(a)(2) because lying is not a necessary element of a theft crime. See Saltzburg et. al., Federal Rules of Evidence Manual at 609-12.

It is advisable, then (again assuming that Rule 609(a)(1) is abrogated) to limit admissibility of convictions under Rule 609(b) to those that, if more recent, would be automatically admissible under Rule 609(a)(2).

***An amendment might look like this:***

**(b) Limit on Using the Evidence After 10 Years.** This subdivision (b) applies if more than 10 years have passed since the witness’s conviction or release from confinement for it, whichever is later. Evidence of the conviction is admissible only if it involved a dishonest act or false statement and:

(1) its probative value, supported by specific facts and circumstances, substantially outweighs its prejudicial effect; and

(2) the proponent gives an adverse party reasonable written notice of the intent to use it so that the party has a fair opportunity to contest its use.

There is another benefit of narrowing admissibility to falsity-based convictions. With or without Rule 609(a)(1), it is a misapplication of Rule 609(b) to allow impeachment with an old conviction for heroin possession, or a firearms violation, as seen in the cases above. The proposed amendment actually stands on its own feet as a helpful clarification and refinement of Rule 609(b).

A proposed amendment to Rule 609(b), to provide consistency with an amendment to Rule 609(a)(1), is set forth in the last section of this memo.

***C. The Impact on Rule 608(b)***

Assume a defendant-witness has a five-year-old conviction for carjacking. If Rule 609(a)(1) is eliminated, an accused could not be impeached with that conviction as it does not involve a dishonest act or false statement. But what if he takes the stand and the prosecutor asks: “Isn’t it true that you highjacked a car?” The prosecutor argues that he can ask that question because he is not asking whether the defendant was convicted. He is asking about whether the defendant committed a bad act under Rule 608(b).

Rule 608(b) allows a cross-examiner to inquire into bad acts of a witness, in order to attack the witness’s character for truthfulness, subject to Rule 403. Thus, questioning about a bad act is allowed unless the probative value of the bad act in showing the witness’s character for untruthfulness is substantially outweighed by the risk of unfair prejudice suffered by the party whose testimony the witness favors. Both the original Advisory Committee Note and the Committee Note to the 2003 amendment specify that impeachment with bad acts is regulated under Rule 403. *See United States v. Abair*, 746 F.2d 260, 263 (7<sup>th</sup> Cir. 2014) (cross-examination with

bad acts to attack a witness's character for truthfulness "remains subject to the overriding protection of Rule 403").<sup>11</sup>

If Rule 609(a)(1) is to be abrogated, the Committee needs to deal with the possibility of parties using Rule 608(b) as an end-run, by asking questions about a bad act that was the subject of a conviction that is itself not admissible. It obviously makes no sense to prohibit admissibility of convictions but then to allow the underlying acts to be introduced.

There are a few courts that currently allow Rule 608(b) as an end-run on an important limitation currently established by courts under Rule 609: that when a conviction is admitted, the jury does not get to hear the details of the underlying acts, only the crime of which the witness was convicted and the date of the conviction. Some courts have held that a cross-examiner can in fact raise the details of these acts simply by citing Rule 608(b). *See, e.g., Elcock v. Kmart Corp.*, 233 F.3d 734 (3<sup>rd</sup> Cir. 2000); *United States v. Barnhart*, 599 F.3d 737 (7<sup>th</sup> Cir. 2010). Most courts rightly disagree, concluding that the limitations imposed on the details of the conviction would have no effect if the cross-examiner could simply ask about the underlying acts under Rule 608(b). *See, e.g., United States v. Osazuwa*, 564 F.3d 1169 (9<sup>th</sup> Cir. 2009) (impeachment with prior convictions is within the exclusive purview of Rule 609). If Rule 609(a)(1) is deleted, it would not be surprising for parties, in the courts that already permit it, to use Rule 608(b) to raise the acts underlying the otherwise inadmissible conviction.

Surely it would make no sense to promulgate a rule that could be so easily evaded. Therefore elimination of Rule 609(a)(1) would have to be accompanied by a provision, best placed in Rule 608(b), that prohibits raising the acts of convictions that are not admissible under Rule 609.<sup>12</sup>

But even if there is something in the text that prohibits a Rule 608(b) end-run, there will be a remaining anomaly. That prohibition will apply only to bad acts that underlie a conviction --- it will not apply to bad acts for which the witness was never convicted. Here is a hypothetical that shows the anomaly: Joe is charged with bank robbery and he wants to testify. He has been previously convicted of bank robbery. If Rule 609(a)(1) is eliminated and the necessary no-end-run rule is added, Joe can testify free of any impeachment regarding the prior bank robbery (including bad act impeachment). Now Bill is charged with bank robbery and he wants to testify. The prosecution has good faith proof that he committed a prior bank robbery, for which he has not

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<sup>11</sup> While a bad act that passes through Rule 403 can be raised while examining the witness, extrinsic evidence is not admissible to prove the act. Rule 608(b).

<sup>12</sup> It might be argued that it is acceptable to allow bad acts under Rule 608(b) even though the conviction is not admissible under Rule 609(a), because under Rule 608(b), the witness can just deny that the bad act occurred. No extrinsic evidence is allowed to disprove the denial. But even though the witness can deny it, the cross-examiner still gets to raise it, and the jury is fully exposed to the prejudicial information of bad character. Moreover, denying a bad act that was the basis of a conviction is grounds for a perjury charge.



been charged.<sup>13</sup> If the court finds that the prejudicial effect does not substantially outweigh the probative value, the prosecution may ask about the bank robbery despite any abrogation of Rule 609(a)(1). The result is that a defendant who has been convicted of a crime is in a better place than one who has not.

If Rule 609(a)(1) is abrogated, then the solution to Rule 608(b) is to limit cross-examination to those acts that, if there were a conviction, it would be one that is admissible under Rule 609(a)(2). This is the only way to assure that convictions and bad acts are treated uniformly. Such a requirement would mean that no bad act would be admissible unless it was one of dishonesty or false statement. So, facts underlying a bank robbery conviction, as well as facts underlying a bank robbery that has never been charged, will be inadmissible. Something like the following could work:

**Rule 608. A Witness’s Character for Truthfulness or Untruthfulness**

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**(b) Specific Instances of Conduct.** Except for a criminal conviction under Rule 609, extrinsic evidence is not admissible to prove specific instances of a witness’s conduct in order to attack or support the witness’s character for truthfulness. But the court may, on cross-examination, allow them to be inquired into if they: ~~are probative of the character for truthfulness or untruthfulness of~~

(1) involve a dishonest act or false statement; and

~~(1)~~ (2) are acts of the witness or (2)——another witness whose character the witness being cross-examined has testified about.

By testifying on another matter, a witness does not waive any privilege against self-incrimination for testimony that relates only to the witness’s character for truthfulness.

This drafting solution has a number of benefits. First, it avoids the use of Rule 608(b) as an end-run of an elimination of Rule 609(a)(1). Second, and more broadly, it protects a party from impeachment of witnesses with acts that have less probative value as to truthfulness than acts of falsity.

This proposal is further developed in the final section on drafting alternatives, below.

***D. Is Rule 403 Still Applicable?***

A principle that runs through the Evidence Rules is that Rule 403 balancing is applicable unless a rule says otherwise. So for example, Rule 403 balancing is applicable to prior bad acts

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<sup>13</sup> Good faith proof is all that is required to ask a question about bad acts. *See, e.g., United States v. Whitmore*, 359 F.3d 609, 622 (D.C. Cir. 2004) (“the general rule is that the questioner must be in possession of some facts which support a general belief that the witness committed the offense or the degrading act to which the question relates”).

after the government establishes a non-character purpose for those acts under Rule 404(b). And Rule 403 balancing is applicable after a plaintiff establishes a proper purpose for a subsequent remedial measure. *See, e.g., Stallworth v. Illinois Cent. G. R.R.*, 690 F.2d 858 (11<sup>th</sup> Cir. 1982) (even though a subsequent remedial measure was relevant to feasibility, the trial court had discretion to exclude it under Rule 403). And, impeachment by bias is covered by Rule 403 even though there is no Evidence Rule that specifically covers bias. *United States v. Abel*, 469 U.S. 45 (1984).

So there is a risk that a simple or “mere” abrogation of Rule 609(a)(1) could lead to a litigant arguing that Rule 403<sup>14</sup> remains applicable to impeachment with non-falsity-based convictions. That would not be a strong argument, after an elimination of Rule 609(a)(1), but it is one that should be guarded against by careful rulemaking. One way to address the possible problem is to do more than simply abrogate Rule 609(a)(1). Instead of a vacuum, Rule 609(a)(1) could be amended to provide specifically that convictions currently covered by the Rule are not admissible to impeach a witness. That would assure that any Rule 403 argument would be put to rest. The drafting example for that proposition is set forth in the next section.

### ***E. Which Convictions Remain Admissible?: The Scope of Rule 609(a)(2)***

Rule 609(a)(2) provides that both felonies and misdemeanors “must be admitted” to impeach a witness’s character for truthfulness if “establishing the elements of the crime required [the proponent] proving—or the witness’s admitting—a dishonest act or false statement.” The scope of the crimes covered by Rule 609(a)(2) is discussed in a Committee Note to the 1990 amendment, that corrected Congress’s error in allowing impeachment of “the defendant” in a civil case. According to the Committee Note only those “crimes such as perjury, subornation of perjury, false statement, criminal fraud, embezzlement, or false pretense” are automatically admissible, and not subject to Rule 403 balancing.

Courts have had some difficulty differentiating those crimes that are falsity-based from those that are not. More specifically the dispute is over whether a crime that does not require proof of perjury, false statement, or fraud can nonetheless be automatically admitted. Most crimes involve at least some deceitful behavior, even if the element of the crime does not require proof of a lie or fraud. For example, almost every theft-based crime involves some deceit—stealing property or lying about intent to return it. Shoplifters usually take items when they think no one is looking and often hide items in their clothing, both of which can be considered deceitful acts. If these expansive views of what constitutes *crimen falsi* were accepted, then pretty much every criminal conviction would be automatically admissible under Rule 609(a)(2). That was not the intent of the rule or else the drafters would have written this rule: “a witness’s criminal convictions must be admitted.”

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<sup>14</sup> More specifically, Rule 402, which provides that all relevant evidence is admissible.

A few courts have held that theft-based crimes are automatically admissible under Rule 609(a)(2).<sup>15</sup> The idea is that a person committing such a crime is living a life of deceit. Most courts, however, understand that the drafters intended a more nuanced, less inclusive approach, and find that theft-based convictions are not automatically admissible under Rule 609(a)(2).<sup>16</sup> In reaching this result, these courts tend to focus on the rule’s policy and legislative history, which evidences a stronger distinction between *crimen falsi* and other sorts of crimes.<sup>17</sup>

On the merits, theft convictions should not be automatically admissible under Rule 609(a)(2). Rule 609(a)(2) should be construed narrowly, because it is an outlier. It precludes the court from exercising any discretion, and if the Federal Rules are about anything, they are about judicial discretion. Thus, Rule 609(a)(2) should be construed as an exception to the rule.<sup>18</sup> As the D.C. Circuit stated:

Rule 609(a)(2) is to be construed narrowly; it is not *carte blanche* for admission on an undifferentiated basis of all previous convictions for purposes of impeachment; rather, precisely because it involves no discretion on the part of the trial court, Rule 609(a)(2) must be confined to a narrow subset of crimes — those that bear directly upon the accused’s propensity to testify truthfully.<sup>19</sup>

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<sup>15</sup> *United States Xpress Enters. v. J.B. Hunt Transp.*, 320 F.3d 809, 816-17 (8th Cir. 2003) (“The trial court found that [receiving stolen property] was a crime involving dishonesty. Evidentiary rulings are reviewed for an abuse of discretion. The court did not abuse its discretion in allowing USX to use the conviction as a basis for impeachment.”); *United States v. Del Toro Soto*, 676 F.2d 13, 18 (1st Cir. 1982) (“The grand larceny conviction could certainly have been introduced under Federal Rule of Evidence 609(a)(2).”); *United States v. Carden*, 529 F.2d 443, 446 (5th Cir. 1976) (stating that petty larceny is a crime involving dishonesty).

<sup>16</sup> *E.g.*, *United States v. Washington*, 702 F.3d 886, 892-94 (6th Cir. 2012) (theft of services); *United States v. Estrada*, 430 F.3d 606 (2d Cir. 2005) (shoplifting that involved “tak[ing] elusive action to avoid detection”); *United States v. Johnson*, 388 F.3d 96 (3d Cir. 2004) (purse snatching); *United States v. Foster*, 227 F.3d 1096, 1100 (9th Cir. 2000) (shoplifting, burglary, grand theft, bank robbery, and receipt of stolen property); *United States v. Dunson*, 142 F.3d 1213, 1215 (10th Cir. 1998) (“[W]e have held that crimes like burglary, robbery, and theft are not automatically admissible under Rule 609(a)(2).” (citation omitted)); *United States v. Sellers*, 906 F.2d 597, 603 (11th Cir. 1990) (“It is established in this Circuit, however, that crimes such as theft, robbery, or shoplifting do not involve dishonesty or false statement within the meaning of Rule 609(a)(2).” (quotation marks and citations omitted)); *United States v. Smith*, 551 F.2d 348, 362 (D.C. Cir. 1976) (“Attempted robbery is not a crime involving ‘dishonesty or false statement’ within the meaning of Rule 609(a)(2).”).

<sup>17</sup> *E.g.*, *Washington*, 702 F.3d at 893 (“Congress in drafting Rule 609(a)(2) directed courts specifically toward crimes ‘in the nature of *crimen falsi* . . . . The rule is intended to inform fact-finders that the witness has a propensity to lie, and, as morally repugnant as some crimes may be, crimes of violence or stealth have little bearing on a witness’s character for truthfulness.”).

<sup>18</sup> 28 WRIGHT & MILLER, Evidence § 6135 (2d ed. Apr. 2022 update) (“[I]t seems unlikely Congress intended such a broad construction in light of the fact subdivision (a)(2) leaves the court no discretion to weigh probative value against prejudice.”).

<sup>19</sup> *United States v. Fearwell*, 595 F.3d 771, 777 (D.C. Cir. 1978).

It makes sense to construe the only provision in the entire Federal Rules of Evidence that limits such discretion — Rule 609(a)(2) — to be the exception rather than the rule.

The Committee visited the line between Rule 609(a)(1) and 609(a)(2) in the 2006 amendment to Rule 609(a)(2). That amendment was addressed to cases holding that a crime was automatically admissible *if the defendant lied to commit it*. So under that case law, even a murder conviction would be automatically admissible if a person lied in committing it --- which would basically mean every murder would be automatically admissible. The 2006 amendment generally prohibits a court from going behind the conviction to try to determine how the crime was committed and whether there was any deceit involved. Rule 609(a)(2) was amended to provide that convictions are automatically admissible only when the conviction (or the guilty plea) required proof of an act of dishonesty or false statement. While the text of the amendment did not address whether theft convictions were automatically admissible, the Committee Note does provide that “[h]istorically, offenses classified as *crimina falsi* have included only those crimes in which the ultimate criminal act was itself an act of deceit.”

The dispute in the courts about theft convictions is in fact not a reason in itself to propose another amendment to Rule 609(a)(2). There are only a few cases finding theft convictions to be automatically admissible. And all of those cases predate the 2006 amendment, which mandates a more careful attitude in applying Rule 609(a)(2) and clarifies in the note that deceit needs to be an element of the crime. Indeed most of those few cases predate the 1990 amendment, where the Committee Note states that some decisions “take an unduly broad view of ‘dishonesty,’ admitting convictions such as for bank robbery or bank larceny.”

That said, if Rule 609(a) is to be amended, the Committee may wish to consider an amendment that would preclude automatic admissibility of theft-based convictions. An amendment might look like this:

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

A possible add-on amendment to deal with theft convictions is set forth in the drafting alternatives, below.

#### ***IV. Drafting Examples***

##### ***A. Abrogating Rule 609(a)(1)***

This subsection assumes that the Committee has determined that all convictions currently found admissible under Rule 609(a)(1) should be found inadmissible. As stated above, it will not do to simply delete the language of Rule 609(a)(1). This is so for at least two reasons: 1. It will raise questions about the continued applicability of Rule 403; and 2. It will put a big hole in the

Rule, as there will be no (a)(1), but (a)(2) will remain. So there should be affirmative language of exclusion in place of the current language of admissibility under Rule 609(a)(1). What follows are two possible versions of an amendment --- one that retains the structure of the existing Rule 609(a)(1) and the other that essentially makes Rule 609(a)(2) the Rule.

The necessary correction to Rule 609(b) is added to both these drafting alternatives.

The provision stating that theft crimes are not admissible is included in brackets in these drafting alternatives, as is a paragraph in the Committee Note about that change.

### *1. Version 1: Retaining the Structure*

The virtue of this version is that retaining the structure provides constancy for electronic searches, and for the nomenclature that has been used for 40 years. That is to say, Rule 609(a)(2) remains Rule 609(a)(2). The drawback of this version is that it is a bit awkward. It starts with a general rule of inadmissibility but then shifts to a rule of automatic admissibility.

#### **Rule 609. Impeachment by Evidence of a Criminal Conviction**

**(a) In General.** The following rules apply to attacking a witness's character for truthfulness by evidence of a criminal conviction:

**(1)** the evidence generally may not be admitted; but for a crime that, in the convicting jurisdiction, was punishable by death or by imprisonment for more than one year, the evidence  
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~~**(A)** must be admitted, subject to Rule 403, in a civil case or in a criminal case in which the witness is not a defendant; and~~

~~**(B)** must be admitted in a criminal case in which the witness is a defendant, if the probative value of the evidence outweighs its prejudicial effect to that defendant; and~~

**(2)** ~~for any crime regardless of the punishment,~~ the evidence must be admitted if the court can readily determine that establishing the elements of the crime required proving—or the witness's admitting—a dishonest act or false statement.

[(3) A crime containing an element of theft may not be treated as requiring proof or admission of a dishonest act or false statement under this rule.]

**(b) Limit on Using the Evidence After 10 Years.** This subdivision (b) applies if more than 10 years have passed since the witness's conviction or release from confinement for it, whichever is later. Evidence of the conviction is admissible only if it involved a dishonest act or false statement and:

**(1)** its probative value, supported by specific facts and circumstances, substantially outweighs its prejudicial effect; and

- (2) the proponent gives an adverse party reasonable written notice of the intent to use it so that the party has a fair opportunity to contest its use.

## **2. Different structure, single rule:**

The virtue of this alternative is that it is a simple and direct rule, allowing admissibility only for convictions involving dishonesty or false statement. The downside is that the numeric structure has been altered, so it is disruptive to electronic searches and imposes dislocation costs.

### **Rule 609. Impeachment by Evidence of a Criminal Conviction**

**(a) In General.** ~~The following rules apply to attacking~~ Evidence of a criminal conviction offered to attack a witness's character for truthfulness ~~by evidence of a criminal conviction:~~

~~(1) for a crime that, in the convicting jurisdiction, was punishable by death or by imprisonment for more than one year, the evidence:~~

~~(A) must be admitted, subject to Rule 403, in a civil case or in a criminal case in which the witness is not a defendant; and~~

~~(B) must be admitted in a criminal case in which the witness is a defendant, if the probative value of the evidence outweighs its prejudicial effect to that defendant; and~~

~~(2) for any crime regardless of the punishment, the evidence must be admitted, but only if the court can readily determine that establishing the elements of the crime required proving—or the witness's admitting—a dishonest act or false statement. Any other conviction is not admissible under this rule. [A crime containing an element of theft may not be treated as requiring proof or admission of a dishonest act or false statement under this rule.]~~

**(b) Limit on Using the Evidence After 10 Years.** This subdivision (b) applies if more than 10 years have passed since the witness's conviction or release from confinement for it, whichever is later. Evidence of the conviction is admissible only if it involved a dishonest act or false statement and:

(1) its probative value, supported by specific facts and circumstances, substantially outweighs its prejudicial effect; and

(2) the proponent gives an adverse party reasonable written notice of the intent to use it so that the party has a fair opportunity to contest its use.

***Here is a clean copy version of this alternative Rule 609(a):***

**(a) In General.** Evidence of a criminal conviction offered to attack a witness's character for truthfulness must be admitted, but only if the court can readily determine that establishing the elements of the crime required proving—or the witness's admitting—a dishonest act or false statement. Any other conviction is not admissible under this rule. [A crime containing an element of theft may not be treated as requiring proof or admission of a dishonest act or false statement under this rule.]

***3. Draft Committee Note***

The draft Committee Note can probably be the same for both of the above alternatives. Here is a possible Note:

Rule 609(a) has been amended to preclude admissibility of a conviction offered to impeach a witness's character for truthfulness, when the conviction does not involve a dishonest act or false statement. Congress allowed such impeachment with non-falsity-based convictions under Rule 609(a)(1), but imposed important limitations, especially when the witness was the accused. Experience has shown that the congressional intent to limit admissibility of such convictions has not been realized. Moreover, the available empirical evidence indicates that the probative value of convictions that do not involve falsity is minimal when they are offered as a prediction that the witness will lie on the stand. Moreover, the unfair prejudicial effect of such convictions can be profound. That threat of unfair prejudice may well result in deterring a defendant in a criminal case from testifying at all. The Committee has determined that it is better to bar admission of non-falsity-based convictions than to employ a balancing test that has proved to be insufficiently protective. The Rule retains automatic admissibility for those convictions that are the most probative, i.e., those that required proof that the witness engaged in a dishonest act or false statement.

While the most serious concerns about the original Rule 609(a)(1) arose with respect to criminal-defendant witnesses, the lack of probative value as to such convictions when offered to prove that a witness will lie presents a substantial problem across the board --- as does the risk of unfair prejudice. Therefore, the amendment precludes the use of non-falsity-based convictions in all cases as to all witnesses.

[The amendment also clarifies what most courts have held: that theft-related convictions do not involve a dishonest act or false statement within the meaning of the rule. This is because unlike, for example, a fraud crime, the elements of a theft crime are not dependent on doing a dishonest act or making a false statement. *See United States v. Fearwell*, 595 F.3d 771, 777 (D.C. Cir. 1978) (“Rule 609(a)(2) must be confined to a

narrow subset of crimes — those that bear directly upon the accused’s propensity to testify truthfully.”.)]

While Rule 609 governs evidence of convictions, this amendment also has an impact on admissibility of the bad acts that underlie the convictions. If a conviction is inadmissible under this Rule as amended, it is inappropriate to allow a party to inquire about the bad acts underlying the conviction. Accordingly, Rule 608(b) has been amended to impose a limitation on bad act impeachment that tracks the provisions of Rule 609(a).

The amendment also has a necessary effect on the admissibility of old convictions under Rule 609(b). Because a recent non-falsity-based conviction cannot be used to impeach a witness’s character for truthfulness, it follows that the same conviction cannot be admissible when it passes the ten-year period of Rule 609(b). Therefore, Rule 609(b) has been amended to impose a limitation that tracks the provisions of Rule 609(a).

The amendment imposes no limitations on the use of convictions for other forms of impeachment, such as for contradiction, or to establish a motive to falsify.

## ***B. Applying the Bar in Criminal Cases Only***

### **Rule 609. Impeachment by Evidence of a Criminal Conviction**

**(a) In General.** The following rules apply to attacking a witness’s character for truthfulness by evidence of a criminal conviction:

**(1)** for a crime that, in the convicting jurisdiction, was punishable by death or by imprisonment for more than one year, the evidence:

**(A)** must be admitted, subject to Rule 403, in a civil case ~~or in a criminal case in which the witness is not a defendant~~; and

**(B)** ~~must~~ may not be admitted in a criminal case ~~in which the witness is a defendant, if the probative value of the evidence outweighs its prejudicial effect to that defendant~~; and

**(2)** for any crime regardless of the punishment, the evidence must be admitted if the court can readily determine that establishing the elements of the crime required proving—or the witness’s admitting—a dishonest act or false statement.

**(b) Limit on Using the Evidence After 10 Years.** This subdivision (b) applies if more than 10 years have passed since the witness’s conviction or release from confinement for it, whichever is later. Evidence of the conviction is admissible only if:

**(1)** its probative value, supported by specific facts and circumstances, substantially outweighs its prejudicial effect; ~~and~~



(2) in a criminal case, it involved dishonesty or false statement; and<sup>20</sup>

(2) the proponent gives an adverse party reasonable written notice of the intent to use it so that the party has a fair opportunity to contest its use.

### *Draft Committee Note*

Rule 609(a) has been amended to preclude admissibility of a conviction offered to impeach a witness's character for truthfulness, when the conviction does not involve a dishonest act or false statement. Congress allowed such impeachment with non-falsity-based convictions under Rule 609(a)(1), but imposed important limitations, especially when the witness was the accused. Experience has shown that the congressional intent to limit admissibility of such convictions has not been realized. Moreover, the available empirical evidence indicates that the probative value of convictions that do not involve falsity is minimal when they are offered as a prediction that the witness will lie on the stand. Moreover, the unfair prejudicial effect of such convictions can be profound. That threat of unfair prejudice may well result in deterring a defendant in a criminal case from testifying at all. The Committee has determined that it is better to bar admission of non-falsity-based convictions than to employ a balancing test that has proved to be insufficiently protective. The Committee has also determined that it would be an imbalance to protect the witnesses for the defense while leaving the prosecution's witness open to this minimally probative and often highly prejudicial impeachment with prior convictions that do not require proof of a dishonest act or a false statement. Therefore the amendment applies to limit impeachment of all witnesses in criminal cases.

The amendment does not affect the existing rules on impeachment in civil cases, and retains automatic admissibility in all cases for those convictions that are the most probative, i.e., those that involve a dishonest act or false statement.

While Rule 609 governs evidence of convictions, this amendment also has an impact on admissibility of the bad acts that underlie the convictions that are barred. If a conviction is inadmissible under this Rule as amended, it is inappropriate to allow a party to inquire about the bad acts underlying the conviction. Accordingly, Rule 608(b) has been amended to impose a limitation on bad act impeachment that tracks the provisions of Rule 609(a).

The amendment also has a necessary effect on the admissibility of old convictions under Rule 609(b), in criminal cases. Because a recent non-falsity-based conviction cannot be used to impeach a witness's character for truthfulness in a criminal case, it follows that the same conviction cannot be admissible when it passes the ten-year period of Rule 609(b).

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<sup>20</sup> Note that the accompanying change to Rule 609(b) is more complicated here than in the previous models, because non-falsity convictions can still be admissible in civil cases.

Therefore, Rule 609(b) has been amended to impose a limitation that tracks the provisions of Rule 609(a) in criminal cases.

The amendment imposes no limitations on the use of convictions for other forms of impeachment, such as for contradiction, or to establish bias.

*C. Companion Amendment to Rule 608(b)*

**Rule 608. A Witness’s Character for Truthfulness or Untruthfulness**

\* \* \*

**(b) Specific Instances of Conduct.** Except for a criminal conviction under Rule 609, extrinsic evidence is not admissible to prove specific instances of a witness’s conduct in order to attack or support the witness’s character for truthfulness. But the court may, on cross-examination, allow them to be inquired into if they: ~~are probative of the character for truthfulness or untruthfulness of~~

(1) involve a dishonest act or false statement; and

(2) are acts of the witness or (2) of another witness whose character the witness being cross-examined has testified about.

By testifying on another matter, a witness does not waive any privilege against self-incrimination for testimony that relates only to the witness’s character for truthfulness.

*Committee Note*

Rule 608(b) has been amended to provide that that only acts of dishonesty or false statement can be inquired into when impeaching a witness’s character for truthfulness. Rule 609 has been amended to bar impeachment with convictions that do not require proof of a dishonest act or false statement. It follows that Rule 608 must be similarly limited. It would make no sense to prohibit impeachment of a person who has been convicted of a non-falsity-based crime, while permitting such impeachment of a person who has not been convicted of the same crime. Nor does it make sense to allow a party to impeach with bad acts underlying a conviction that is itself inadmissible under Rule 609. Rule 608(b) is not an avenue that can be used to evade the limitations on admitting convictions under Rule 609.<sup>21</sup>

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<sup>21</sup> Note that if the bar on impeachment is limited to criminal cases, the accompanying Rule 608 amendment and Committee Note will have to be tweaked, to limit the amendment to criminal cases.

**Reporter comment on retaining Rule 609(a)(1) in civil cases:**

If Rule 609(a)(1) were to still apply in civil cases, one might wonder whether the parallel amendments to Rules 609(b) and 608 should also be limited to criminal cases. There is good reason to amend Rule 609(b) for all cases, civil and criminal. It seems inappropriate to allow a court to admit an old conviction, even in a civil case, where the conviction did not involve dishonesty or false statement. So, arguably, that change should be extended across the board. However, as to Rule 608(b), that rule should track whatever change is made in Rule 609(a)(1) --- because there is no reason at all to treat admissibility of convictions differently from bad acts. For example, it would make no sense to allow a conviction for robbery to be potentially admissible in a civil case, but to bar bad act impeachment of a person who committed robbery but wasn't convicted of it. So if the Committee were to propose a "criminal case only" bar on Rule 609(a)(1), the parallel limitation in Rule 608(b) would read as follows:

**(b) Specific Instances of Conduct.** Except for a criminal conviction under Rule 609, extrinsic evidence is not admissible to prove specific instances of a witness's conduct in order to attack or support the witness's character for truthfulness. But the court may, on cross-examination, allow them to be inquired into if they: ~~are probative of the character for truthfulness or untruthfulness of~~

(1) in a criminal case, involve a dishonest act or false statement; and

(2) are acts of the witness or (2) of another witness whose character the witness being cross-examined has testified about.

# TAB 5B

***District Court Rulings on Rule 609(a)(1)(B) Impeachment --- 2009-present***

***Case Digest by Professor Liesa Richter, updated by the Reporter***

***April 1, 2024***

A review of recent district court cases analyzing the admissibility of prior felony convictions against criminal defendants for impeachment purposes reveals a variety of approaches to such evidence. Many courts freely admit prior felony convictions for impeachment purposes under Rule 609(a)(1)(B), even those that are very similar to the charged offense. Other courts attempt to protect the defendant from unfair prejudice by sanitizing references to the past felony convictions they admit for impeachment purposes. On the other hand, some courts exclude the only prior felony convictions potentially eligible to impeach a criminal defendant under Rule 609(a)(1)(B), particularly when those convictions are similar to the charged offenses. Finally, some courts compromise by admitting some of a criminal defendant's prior felony convictions for impeachment, while excluding other eligible convictions.

Reporter's Note: The references in the cases below to the balancing of Rule 609(a)(1) factors usually refers to the following factors used by most of the lower courts:

(1) the kind of crime involved (including its probative value as to witness-truthfulness and its similarity to the charged crime); (2) when the conviction occurred; (3) the importance of the defendant's testimony to the case; and (4) the importance of the credibility of the defendant.

*United States v. Caldwell*, 760 F.3d 267 (3<sup>rd</sup> Cir. 2014). *See also United States v. Mahone*, 537 F.2d 922 (7<sup>th</sup> Cir. 1976) (using the same factors but splitting up the first factor into two --- probative value as to credibility and similarity of the crime --- and thus applying five factors).

Reporter's Note: The commentary to the case law is by the Reporter.

***I. The Court Admits All of Defendant's Felony Convictions Under Rule 609(a)(1)(B)***

Many courts admit all of a criminal defendant's prior felony convictions eligible for impeachment use under Rule 609(a)(1)(B), often including prior convictions similar to the charged offense. Some courts support the admissibility of these prior felonies by placing great emphasis on the government's need for impeachment and on the defendant's choice to put his or her credibility in issue by testifying (which are essentially automatic factors). Others order the admission of prior felony convictions more summarily with less analysis.

• **United States v. Walker, 2024 WL 182285 (N.D. Okla.):** In a prosecution for kidnapping, the court found that the following convictions would be admissible to impeach the defendant: October 2009 criminal felony conviction for felon in possession of a firearm; March 2017 criminal felony conviction for possession of a controlled dangerous substance; and August 2018 criminal felony conviction for possession of controlled dangerous substance without tax stamp, possession of controlled dangerous substance with intent to distribute, and possession of

controlled dangerous substance. The court conceded that the convictions “do not involve characteristics that go to Defendant Walker’s capacity for truthfulness.” However, the convictions were timely --- two were a couple of years old, and the age of the firearm conviction was mediated by the fact that there were intervening convictions, indicating that his character was unchanged. The court heavily relied on the fact that the convictions were dissimilar to the kidnapping charge. This affected the next factor, which is the importance of allowing the defendant to testify. The court found that the defendant would not be deterred from testifying because the convictions were dissimilar from the crime charged. Under this analysis, importance of the defendant testifying loses its independence as a factor, because it is directly determined by the similarity or dissimilarity of the convictions. Finally, the court found that credibility was important because the video and other evidence in the case was disputable. The court concluded that “the only factor that weighs against admissibility is factor one: impeachment value. Because all other factors weigh in favor of admissibility, the Court will allow the Government to introduce evidence of Defendants' prior convictions for purposes of impeachment under Fed. R. Evid. 609.”

**So the only factor that weighed in favor of exclusion was that the convictions were at best minimally probative of the defendant's character for truthfulness. Shouldn't that be enough to exclude the convictions. And why are three convictions necessary?**

- **United States v. Harper, 2023 WL 396099 (W.D.Okla.):** The defendant was charged with a sexual assault, and the government sought to impeach him with two recent convictions: 1. Unauthorized use of a motor vehicle with sentencing in September 2016; 2. First degree burglary and attempted escape from arrest or detention in 2016. The court stated that “the Rules of Evidence begin from an assumption that prior felony convictions have impeachment value when a defendant takes the stand.” It concluded that attempted escape from arrest or detention illustrates dishonesty. It reasoned that “the dissimilarity of the vehicular, burglary, and escape convictions from the physical and sexual assault charges does not weigh against admission—just the opposite, rather.” It concluded that “the central issue at trial is the identity of the individual who attacked E.F. Defendant has consistently denied that he attacked E.F., thus, his testimony and credibility are important and central to the trial.” The court found both convictions admissible; but it did exclude older fraud and other convictions under Rule 609(b).

- **United States v. Romero, 2023 WL 2413812 (D.N.Mex.):** In a prosecution for illegal narcotics sales, the defendant moved in limine to exclude his prior conviction for felony shoplifting, if offered to impeach him under Rule 609(a)(1). The court held that the conviction was admissible. It stated that “[t]he implicit assumption of Rule 609 is that prior felony convictions have probative value.” The conviction was near in time, and was not very prejudicial, given the fact that “shoplifting is not of an inflammatory nature and is unlikely to provoke an emotional response” against the defendant and “is sufficiently different from the charged conduct that a jury is unlikely to confuse his past conduct with his current charges.” The court concluded that the defendant’s “credibility would be a central issue for the jury. He was the sole occupant in the vehicle containing the backpack with the narcotics and firearm. The case could turn on whether the jury chooses to believe his testimony concerning his knowledge of the contents of the backpack.”

- **United States v. Crittenden, 2023 WL 2967891 (N.D. Okla.):** In a prosecution for kidnapping, the government sought to impeach the defendant with 13 prior convictions, falling into three separate categories: (1) possession of firearm offenses; (2) possession of controlled substances offenses; and (3) eluding a police officer. The court found all of the convictions to be fairly probative, noting that none of them were for violence. The prejudice was considered low, because none of the convictions were for crimes similar to kidnapping, and thus none were similar to the crime charged. The court found importance of the defendant's testimony to be critical --- but not in the light of preserving the right to testify. Rather, importance of testimony and credibility were both weighed in favor of admission. The court concluded that all thirteen convictions would be admissible to impeach the defendant.

**It's hard to see how the probative value is sufficient for all thirteen convictions. The marginal value of a conviction goes down as more and more are admitted.**

- **United States v. Steward, 2023 WL 8235817 (S.D.Ill.):** The defendant was charged with possession of contraband in prison. The court held that if he testified, all of the following convictions would be admissible against him for impeachment under Rule 609(a)(1): (1) Carjacking; (2) Carrying, Using, and Brandishing a Firearm During and in Relation to a Crime of Violence; (3) Robbery in Indian Country; and (4) Carrying, Using, and Brandishing a Firearm During and in Relation to a Crime of Violence (so, two of them). The court noted that “exclusion is favored where none of the convictions go towards truthfulness” but stated that nonetheless “there is an inherent aspect of dishonesty in the convictions that is somewhat probative even though Steward's convictions do not necessarily involve deceit or false statements within the meaning of Rule 609(a)(2).” It stated that the convictions were “well within the ten-year time period of Rule 609 as they occurred in 2021” and found it relevant that “defendant has no subsequent history as he has been incarcerated since his arrest on January 10, 2021.” The court concluded that prejudice was minimal “because none of Steward's prior convictions were similar to his current offense and thus would not tend improperly to suggest to the jury any tendency on his part to commit the instant offense.” Prejudice was further limited because the jury would know that he was in a prison when he did the act charged. Finally, the court stated that although it did not yet know the defendant’s theory of the case, “there is a strong probability that his testimony will differ from, and potentially contradict, that of the corrections officer.”

- **United States v. Pafaite, 2022 WL 837489 (M.D. Pa):** In a prosecution for distributing methamphetamine, the government sought to admit the following convictions to impeach the defendant: 2012, Conspiracy to commit Criminal Trespass; 2014, Theft by Unlawful Taking; 2019, Theft by Unlawful Taking [Movable Property]; 2021, Receiving Stolen Property. The court found that all the convictions were admissible. The court found the convictions to be very probative of character for truthfulness because they were theft-related. The prejudice of the convictions was found minimal because they were dissimilar to the drug charges. And the importance of testifying factor was crossed out by the importance of credibility factor.

- **United States v. Nace, 2022 WL 686307 (E.D. Okla.):** In a murder prosecution, the government sought to impeach the defendant with two convictions: escape and uttering a forged instrument. The court found both convictions admissible. Neither was similar to the crime charged, and both were inherently dishonest and so probative of character for truthfulness. The court did exclude an old burglary conviction under Rule 609(b).

- **United States v. Matthews, 2022 WL 1198218 (E.D. Okla.):** In a prosecution for aggravated assault, the court held that a nine-year old conviction for escape was admissible to impeach the defendant under Rule 609(a)(1). First, “the conviction tends to show Defendant’s dishonesty or deceit, which provides impeachment value.” Second, “the conviction is within the ten-year cut-off, and, thus, this factor weighs in favor of admitting the conviction.” [Of course that would be true with any conviction offered under Rule 609(a)(1).] Third, “the past crime (escape from a penal institution) is dissimilar from the charged crime (assault). This factor weighs against admitting the prior conviction for impeachment if the crimes are similar because the jury may improperly infer criminal propensity.” Fourth, “Defendant has indicated he will testify and state he was acting in self-defense. His testimony is, thus, important to his defense. This factor weighs against admitting the conviction.” Finally, “Defendant’s credibility will be central at trial” and “this factor weighs in favor of admitting the conviction.” In sum, “the probative value of the 2013 conviction for escape from a penal institution outweighs any prejudicial effect to Defendant. Therefore, it may be introduced if Defendant testifies.”

- **United States v. Davis, 2022 WL 2115846 (D. Minn.):** In a trial for drug distribution and firearm possession, the court held that the defendant’s 8-year-old conviction for burglary was admissible to impeach him under Rule 609(a)(1). The court stated that the defendant’s credibility would be “directly in issue” and that while a burglary conviction “does not implicate his character for truthfulness as directly as a conviction of fraud, for example, the existence of prior felony convictions is, nonetheless, inherently probative of credibility.” The court did exclude assault and burglary convictions that were older than 10 years.

- **United States v. Jefferson, 2021 WL 6196988 (D.D.C.):** The defendant was charged with being a felon in possession of a firearm and ammunition. The government moved in limine to allow impeachment with three convictions if the defendant chose to testify: 1. unlawfully possessing a firearm in 2020; 2. robbery in 2016; and 3. grand larceny in 2015. The court found that all of the convictions would be admissible against the defendant if he testified. The court stated that the robbery and grand larceny convictions both involved theft and that theft is “a serious crime that shows conscious disregard for the rights of others,” so it is more relevant to credibility “than, say, crimes of impulse or simple narcotics and weapons possession.” The prejudice as to the robbery and theft convictions was found minimal because they were not similar to the crime charged. The firearm conviction *was* similar, but the prejudice was in fact limited because that



conviction had already been found to be admissible under Rule 404(b). The court also found that “Jefferson's credibility will likely be of central importance at trial.”

- **United States v. Vaughn, 2021 WL 1561914 (S.D. Ind.):** This opinion is quick enough to include in its entirety. There is no indication of the crime charged or the convictions that are going to be admitted.

The government has filed a motion in limine, seeking a ruling that Mr. Vaughn's prior convictions will be admissible for impeachment under Federal Rule of Evidence 609 if he testifies at trial. Mr. Vaughn has not responded.

If Mr. Vaughn testifies, evidence of his prior convictions “must be admitted” for impeachment “if the probative value of the evidence outweighs its prejudicial effect.” Fed. R. Evid. 609(a)(1)(B). Some of the factors that should be considered in weighing the probative value and prejudicial effect are: “(1) the impeachment value of the prior crime; (2) the point in time of the conviction and the defendant's subsequent history; (3) the similarity between the past crime and the charged crime; (4) the importance of the defendant's testimony; and (5) the centrality of the credibility issue.” [Rodriguez v. United States, 286 F.3d 972, 983 \(7th Cir. 2002\)](#).

Here, for the first factor, Mr. Vaughn's prior convictions have impeachment value. See [United States v. Rein, 848 F.2d 777, 783 \(7th Cir. 1988\)](#) (“[T]he fact that the defendant has been convicted of a prior offense may legitimately imply that he is more likely to give false testimony than other witnesses.”). Second, all of the convictions raised in the motion are recent enough that they do not fall under Rule 609(b)'s additional limits on using evidence “if more than 10 years have passed since the witness's conviction or release from confinement.” Third, there may be some similarity between the current charges and prior convictions, but that is not dispositive when credibility is a key issue. See [Rodriguez, 286 F.3d at 984](#). Fourth, the government has explained that if Mr. Vaughn testifies, that testimony will be central to his defense. And fifth, credibility is central when the defendant's testimony is likely to contradict important eyewitness testimony, as would likely be the case here. See [Rein, 848 F.2d at 782–83](#).

Moreover, as addressed at the final pretrial conference, the Court will instruct the jury on the appropriate use of Mr. Vaughn's prior convictions, including that they may not be used as propensity evidence. See [United States v. Nururdin, 8 F.3d 1187, 1192 \(7th Cir. 1993\)](#) (“[T]he record demonstrates that any prejudicial effect that the instruction of the prior felony convictions could have had was overcome by the court's limiting jury instruction, which directed that this evidence could not be used to demonstrate a propensity to commit crime.”).

- **United States v. Howard, 2020 WL 2781607 (S.D. Ind.):** In a felon-firearm prosecution, the government sought to impeach the defendant with two armed robbery convictions and a battery conviction. The court held that all convictions were admissible. The court found the convictions

for robbery to be “crimes of dishonesty.” The convictions were considered recent *because* they were within the 10-year time limit of Rule 609(a). Finally, the court declared that “battery and armed robbery are not so similar to a felon in possession charge as to create an unacceptable risk that the jury will improperly consider the evidence of battery and armed robbery as evidence that Howard committed the felon in possession of a firearm charge.”

- **United States v. Lewis, 493 F.Supp.3d 858 (C.D. Cal. 2020):** In a bank robbery prosecution, the court held that two prior bank robbery convictions would be admissible to impeach the defendant if he testified. The court found the impeachment value of a bank robbery was “high.” The convictions were recent, and “the Court can mitigate any prejudice from the similarity of the offenses through the limiting instruction it has asked the parties to provide.” The court made no mention of the fact that the convictions were identical to the crime charged.

- **United States v. Perry, 2017 WL 2875946 (D. Minn. 2017):** The defendant was prosecuted for the unlawful possession and reckless discharge of a firearm. The district court found that all three of the defendant’s prior felony convictions – a 2005 conviction for reckless discharge of a firearm, a 2008 conviction for terroristic threats, and a 2010 conviction for terroristic threats and domestic assault – were admissible to impeach him under Rule 609(a)(1)(B). The court did not address the similarity of the past offenses to the charged crimes or analyze the specific Rule 609(a)(1) factors. Instead, the court summarily held that the probative value of all the convictions outweighed any unfair prejudice because the defendant “puts his character for truth in issue when he decides to take the stand.”

**Reading this opinion literally, it means that Rule609(a)(1) convictions are automatically admissible.**

- **United States v. Williams, 2017 WL 4310712 (N.D. Cal. 2017):** Six of eleven charged defendants were heading to trial in a RICO prosecution arising out of gang-related activities involving guns, drugs, prostitution, and stolen property. Although the court deferred a final ruling on the admissibility of the defendants’ many prior convictions under Rule 609 until trial, the court provided a table indicating tentative rulings for each defendant. As the court noted, the table showed that the court was inclined to admit all prior felonies that were less than ten years old and to exclude all older felonies. This would mean that many felonies involving firearms, drugs, robbery, burglary, and murder would be admissible to impeach the defendants’ trial testimony. The court did not give an analysis for each prior felony, but simply provided a tentative ruling for each.

- **United States v. Ford, 2016 WL 259640 (D.D.C. 2016):** Multiple defendants were charged with conspiracy to distribute PCP, possession of PCP with intent to distribute, carrying firearms in a connection with a drug crime, and with being felons in possession of firearms and

ammunition. The court first allowed several of the defendants' prior PCP convictions to be admitted at trial through Rule 404(b) using a conclusory analysis. The court found that all prior convictions admitted under Rule 404(b) could also be used to impeach because no new prejudice would result from that use. The government also sought to use additional PCP convictions, and other convictions of several defendants for carjacking, assault, firearm possession, unauthorized use of a vehicle, and destruction of property to impeach their trial testimony under Rule 609(a)(1)(B). The court found that all of the prior convictions showed a conscious disregard for the rights of others and said something about the credibility of the defendants.

- **United States v. Thomas, 214 F. Supp. 3d 187 (E.D.N.Y. 2016):** The defendant was prosecuted for being a felon in possession of a firearm and the prosecution sought to impeach his trial testimony with five prior felony convictions for: 1) robbery; 2) assault; 3) reckless endangerment; 4) menacing; and 5) criminal contempt. The court refused to permit any of these prior convictions to be admitted under Rule 404(b), but then considered admissibility to impeach through Rule 609(a)(1)(B). The court found the probative value of the defendant's convictions high, particularly because theft and robbery show dishonesty. The court noted that the crimes were recent and that the defendant had continued committing crimes. Although the court acknowledged some similarity between the felon in possession charges and the prior violent crimes, the court stated that similarity does not automatically require exclusion. The court found the defendant's credibility important because he would attempt to contradict government witnesses. Finally, the court noted that the jury would be aware that the defendant was a "felon" due to the nature of the charged offense, such that knowing the particular felonies would not create significant additional prejudice. Thus, the court found all prior felonies admissible to impeach with a limiting instruction confining them to impeachment use.

- **United States v. Warren, 2016 WL 931100 (M.D. Fla. 2016):** The defendant was charged with being a felon in possession of a firearm after officers found guns under a passenger seat in a vehicle in which he was sitting. The defendant had five prior convictions between 2006 and 2008 for: 1) carrying a concealed firearm; 2) unlawfully possessing a firearm; 3) possession of drugs with intent to distribute; 4) fleeing from an officer; and 5) driving with a suspended license. The central issue in the case was the defendant's knowing possession of the guns under his seat and the court admitted both of his prior firearms convictions through Rule 404(b) to prove his knowledge and intent. The government sought permission to use the remaining convictions to impeach the defendant's trial testimony. The court stated that the defendant's credibility would be at issue if he chose to testify and found that he had failed to establish sufficient prejudice from the use of his remaining felony convictions to exclude them (thus incorrectly placing the burden on the defendant to show prejudice rather than on the prosecution to show probative value outweighing any potential prejudice). Although the court noted that its pretrial ruling could be revisited at trial, the court indicated that it was inclined to allow the government to use all of the defendant's recent felony convictions to impeach him.

- **United States v. Boyajian, 2016 WL 225724 (C.D. Cal. 2016):** The defendant was charged with a sex offense against a minor victim. The court found the defendant’s prior sex offense conviction could be used to impeach the defendant’s trial testimony under Rule 609(a)(1) because the defendant’s credibility was crucial and because the prior sex offense suggested dishonesty.

- **United States v. Sneed, 2016 WL 4191683 (M.D. Tenn. 2016):** The defendant was charged with the possession and distribution of cocaine and sought to exclude evidence of three prior felony convictions from trial: 1) a conviction for the sale of a controlled substance; 2) a conviction for the attempted possession of a controlled substance; and 3) a reckless aggravated assault conviction. Although the court did not specify the dates of conviction or release, it analyzed admissibility under Rule 609(a)(1)(B). The court summarily found that the defendant’s credibility would be central to the case if he chose to testify and that, therefore, all prior felonies would be admissible to impeach him. The court did not discuss the probative value of the prior offenses for impeachment or discuss the similarity of the past drug offenses to the instant case.

- **United States v. Hebert, 2015 WL 5553662 (E.D. Ok. 2015):** The defendant was charged with being a felon in possession of explosives after a box of blasting caps was discovered in his home. Wishing to testify at trial that he had no knowledge of the blasting caps, the defendant moved to exclude evidence of three prior convictions for impeachment purposes: 1) a 2008 conviction for possession of methamphetamine with intent to distribute; 2) a 2013 conviction for possession of a controlled substance; and 3) a 2014 conviction for burglary. The court analyzed the Rule 609(a)(1)(B) factors one at a time, noting that none of the defendant’s convictions were for crimes involving an element of dishonesty, but that all of them called his veracity into question. The court found all three convictions recent, particularly the two in the prior two years, thus increasing their probative value. The defendant argued that the association between drugs and guns could carry over to the “explosives” charged in the instant case and argued that the similarity between the past drug crimes and the current offense precluded use of his prior convictions. The court disagreed, finding possession of blasting caps too distinct from past drug offenses to create any risk of propensity use. The court emphasized that the defendant’s testimony was important because he was the only witness who could deny the requisite knowledge of the blasting caps. For the same reason, the court found the defendant’s credibility crucial. With four of five balancing factors weighing in favor of admission, the court found that probative value outweighed any unfair prejudice and ruled that all of the defendant’s prior convictions could be used to impeach his trial testimony under Rule 609(a)(1)(B).

- **United States v. Verner, 2015 WL 1528917 (N.D. Ok. 2015):** The defendant was charged with possession of methamphetamine with intent to distribute and sought to prevent the

government from using the following prior convictions against him as impeachment: 1) a 2006 burglary conviction; 2) a 2007 conviction for possession of a controlled substance; and 3) a 2007 conviction for possession with intent to distribute marijuana and for unlawfully possessing a firearm. The court found that those convictions would be admissible to impeach the defendant's testimony under Rule 609(a)(1)(B). The court found that burglary is probative of veracity and stated that past drug convictions have impeaching value particularly when a defendant "denies involvement with illegal drugs." The court noted the recency of the defendant's past convictions and the importance of his credibility at trial. In response to the defendant's concerns about propensity use of his prior drug convictions, the court noted that it would give a limiting instruction, that it would not allow "details" of past convictions to be shared, and that a defendant places his credibility at issue when he decides to take the stand and that the jury needs information about past convictions to evaluate that credibility.

- **United States v. Rembert, 2015 WL 9592530 (N.D. Iowa 2015):** The defendant was charged with being a felon in possession of a firearm and with possession of marijuana with intent to distribute. The defendant sought to preclude the government from impeaching him with marijuana conviction and a theft conviction. The court found, in conclusory fashion, that both convictions were probative and that the defendant's credibility was important. The court did not address the similarity of the past drug offense to the current charges. It found both prior convictions admissible to impeach.

- **United States v. Sleugh, 2015 WL 3866270 (N.D. Cal. 2015):** The defendant was charged with robbery, drug possession, and with unlawfully possessing and using a firearm after shooting someone during a drug deal. The defendant sought to exclude evidence of his 2008 armed robbery conviction at trial. The court excluded the conviction during the prosecution's case-in-chief under Rule 404(b) after a careful analysis, but then held the conviction admissible to impeach the defendant under Rule 609(a)(1), without analysis of the relevant factors.

- **United States v. Walia, 2014 WL 3734522 (E.D.N.Y. 2014):** A defendant was charged with the importation of drugs and with possession with intent to distribute them. The court summarily held that the defendant's 2011 felony conviction for driving under the influence could be used to impeach his testimony under Rule 609(a)(1)(B) "because of its probative value, which is not unduly prejudicial."

- **United States v. Drift, 2014 WL 4662505 (D. Minn. 2014):** The defendant was charged with the sexual abuse of a child and sought to prevent the government from using two prior felony convictions to impeach his trial testimony: 1) a 2008 conviction for operating under the influence and 2) a 2008 conviction for terroristic threats. The defendant argued that the terroristic threats conviction, in particular, was not probative of his veracity and that its inflammatory nature might

prejudice the jury against him. The court rejected the defendant's arguments and found both convictions admissible to impeach the defendant's testimony. The court emphasized that the defense would aim to undermine and contradict the testimony of the minor victim, making credibility of paramount importance. Without addressing the specific Rule 609(a)(1)(B) factors, the court found that the probative value of the prior convictions outweighed any modest prejudice (that could be alleviated through a limiting instruction).

- **United States v. Gongora, 2013 WL 12219169 (C.D. Cal. 2013):** The defendant was prosecuted for conspiracy, fraud, and failure to file tax returns. The government sought permission to impeach him with his 2004 felony conviction for grand theft. The court found the prior conviction more probative of credibility than prejudicial under Rule 609(a)(1)(B) with very little analysis.

- **United States v. Sutton, 2011 WL 2671355 (C.D. Ill. 2011):** The defendant was charged with possession of crack with intent to distribute and sought to prevent the government from using a nine year-old conviction for delivery of a controlled substance, to impeach his testimony. The court found that drug offenses possess some probative value with respect to veracity. Although the conviction was nine years old at the time of trial, the court found that the defendant did not have a clean record in the intervening years. Although the court noted the similarity of the prior conviction in passing, it found that a limiting instruction would limit prejudice. Finally, the court found the defendant's credibility key given that his testimony would likely contradict that of several other witnesses, thus increasing the probative value of his prior felony. The court concluded that the government could impeach the defendant's trial testimony with his prior similar drug conviction.

- **United States v. Martinez, 2010 WL 11537701 (D. Alaska 2010):** The defendant was charged with narcotics offenses and sought to prevent the government from using his prior robbery conviction to impeach his trial testimony. The court examined the Rule 609(a)(1)(B) factors, finding that robbery is a crime that suggests dishonesty, particularly because the defendant hid the proceeds of the robbery and lied about its commission (though this is going behind the conviction itself in a way that is prohibited under Rule 609(a)(2)). The court also found probative value high because the prior crime was recent, occurring four years earlier. The court noted that there was no similarity between the prior robbery and the instant narcotics charges that might lead to an impermissible propensity inference. Finally, the court acknowledged that the defendant's testimony would be key to the defense, and that the government would need impeaching evidence to help the jury weigh the defendant's credibility. The court found that probative value outweighed any unfair prejudice and allowed the defendant's robbery conviction to be used to impeach him, explaining that criminal defendants are not entitled to take the stand with a false aura of veracity.

- **United States v. Harper, 2010 WL 1507869 (E.D. Wis. 2010):** The defendant was charged with being a felon in possession of a firearm after allegedly shooting a gun out of the window of a vehicle in which he was a passenger. The vehicle allegedly fled from officers shortly after the shots were fired. The government sought to impeach the defendant with four prior felony convictions: 1) a 1995 conviction for battery; 2) a 2001 conviction for the manufacture and delivery of cocaine; 3) a 2006 conviction for fleeing and eluding officers in a vehicle; and 4) a 2006 conviction for drug possession. Because the 1995 conviction fell outside the ten-year window due to a continuance of the trial date, the court found it inadmissible under Rule 609(b). The court found the other three felony convictions admissible to impeach the defendant's trial testimony. Although the defendant argued that drug possession and flight did not suggest dishonesty, the court declared that all felonies are impeaching and that Rule 609(a)(1) felony convictions need not be for crimes of dishonesty in order to be admitted. The court noted the recency of the three felonies. The defendant argued that his 2006 conviction for fleeing in a vehicle would cause unfair propensity prejudice due to its similarity to the events of the instant case, but the court disagreed. The court noted that the defendant was charged only with firearm possession and that flight and firearms were not similar. The court also found the defendant's credibility crucial where his only defense would involve denying possession of the firearm found in the vehicle. The court acknowledged that admitting all three convictions could be considered prejudicial, but found that prejudice was lessened because the jury would already know the defendant was a "felon" due to the current charge. Therefore, the court found that the defendant's credibility was sufficiently important to justify admission of all three prior convictions.

- **United States Stolica, 2010 WL 538233 (S.D. Ill. 2010):** The defendant was charged with illegal counterfeiting and with being a felon in possession of a firearm. The defendant moved to preclude the government from admitting two 1999 convictions for bank robbery to impeach his trial testimony. The court found one conviction outside the Rule 609 ten-year time period and one inside of that window. Nonetheless, the court held that both bank robbery convictions would be admissible to impeach the defendant's testimony at trial. The court found that bank robbery was indicative of credibility even though it was not a crime of dishonesty. The court also found that bank robbery presented little propensity risk due to its lack of similarity to the charged offenses of counterfeiting and illegal possession of a firearm. Finally, the court found that the defendant's credibility was very important because he would likely contradict government witnesses if he took the stand. In admitting both convictions, the court emphasized that they would only be admissible in the event that the defendant chose to testify --- thus they were not admissible under Rule 404(b).

- **United States v. Campbell, 2010 WL 1610583 (C.D. Ill. 2010):** A defendant facing cocaine distribution charges sought to prevent the government from using his prior conviction for the manufacture and delivery of a controlled substance to impeach his trial testimony. With no analysis regarding the prejudice caused by admission of a similar past conviction, the court found that the prior felony had impeachment value and should be permitted if the defendant chose to testify. The court held that the crime charged, the date, and the disposition would be allowed.

- **United States v. Lujan, 2008 WL 11359114 (D.N.M. 2008):** Without explaining the current charges or performing analysis, the court ruled that the defendant’s prior conviction for the possession of marijuana would be admissible against him if he testified. The court stated only that the defendant’s credibility was important and that the prior conviction could demonstrate a motive for the instant offense (which would implicate Rule 404(b) rather than Rule 609 which the court was analyzing).

- **United States v. Alfonso, 1995 WL 276198 (S.D. N.Y. 1995):** A defendant charged with conspiracy to distribute cocaine sought to prevent the prosecution from impeaching his trial testimony with his prior conviction for attempted criminal possession of cocaine. The court found the conviction admissible to impeach because drug trafficking was considered dishonest in the Second Circuit. With no analysis of unfair prejudice, the court found the prior conviction admissible to impeach the defendant if he testified.

- **United States v. Jackson, 1995 WL 337067 (N.D. Ill. 1995):** A defendant was charged with operating a fraudulent telemarketing scheme and sought to prevent the government from impeaching his trial testimony with two prior drug convictions. The court found that the defendant’s commission of prior felonies reflected on his credibility and noted that the past crimes bore no resemblance to the charged fraud, thus minimizing unfair prejudice. Although the defendant argued that his trial testimony was crucial and could determine the outcome of the case (and so he should not be prevented from testifying for fear of impeachment) the court found that this elevated the importance of his credibility and the probative value of the impeaching convictions.



## ***II. The Court Sanitizes Defendant’s Felony Convictions Admitted Under Rule 609(a)(1)(B)***

Many courts that are inclined to allow use of a criminal defendant’s felony record for impeachment under Rule 609(a)(1)(B) compromise by sanitizing the government’s references to the defendant’s past misdeeds. This typically means that the government may cross-examine a defendant about a generic “felony” or “felonies” committed on a specified date. Courts utilize this technique most frequently when faced with prior felony convictions that are similar to the charged offense. Sometimes, the prosecution proposes, or at least agrees to such sanitized references. In other courts, this practice is prohibited, on the ground that jurors cannot properly assess the probative value of the conviction on the defendant’s character for truthfulness unless they know what the conviction was for.

- **United States v. Cruz, 2024 WL 621321 (D.N. Mex.):** In a prosecution for drugs and firearms violations, the government sought to impeach the defendant with his prior convictions for felony terroristic threats and possession of narcotics on school property, and aggravated burglary. The court held that neither of the convictions satisfied the Rule 609(a)(1)(B) balancing test. Neither was very probative of a character for truthfulness, and the narcotics crime was especially prejudicial due to its similarity with the crime charged. So it appeared that the court was going to exclude all evidence of the convictions. But the court noted that the defendant had stipulated to the facts of the convictions, so the court ruled that if the defendant testified, the jury would be informed that he had committed two prior felonies.

- **United States v. Briscoe, 2023 WL 8237269 (D.N.M.):** In a prosecution for attempted carjacking and illegal use of firearms, the government sought to impeach the defendant with prior convictions for armed robbery. The court found that the probative value of the convictions was limited because armed robbery is a crime of violence, and the probative value was further limited because the crimes were nine years old. Most importantly to the court, the similarity to the crimes charged raised a high risk of prejudicial effect. Finally, the court opined that the “importance of the testimony” and “importance of credibility” factors essentially crossed each other out. One would think that this analysis would lead to exclusion of the convictions. But the court stated that “the jury must be well-informed in order to weigh the testimony of Mr. Briscoe against the testimony of Jane Doe 1, Jane Doe 2, and Jane Doe 3.” The court therefore compromised and allowed the jury to hear that the defendant had been convicted of the two felonies, but would not be told what the crimes were.

**Note: This is a case where it is pretty clear that if sanitization were not an option, the court would have excluded the convictions. Also, it is odd to say that the jury “must be well-**

**informed” and yet then give them barebones information which is actually impossible to assess for probative value.**

- **United States v. Johnson, 2022 WL 2835955 (M.D. Pa.):** In a narcotics prosecution, the court held that the defendant’s two prior narcotics convictions were admissible for impeachment. It reviewed extensive authority in which courts allowed impeachment with prior drug convictions in drug prosecutions. It concluded as follows:

No doubt that courts have allowed the government to refer to the nature of the defendant's prior felony convictions once they determined that the convictions were admissible for impeachment purposes under Rule 609(b)(1). However, as an additional safeguard in this particular case, the court will only allow the government to refer to the fact that Johnson was convicted of prior felonies without specifying the nature of his drug convictions. . . . [T]his court finds that the admission of Johnson's two stated prior drug offenses is too similar to the instant charges he faces, and that it is appropriate in this case for the government to sanitize the offenses by only referring to them as prior felony convictions. Thus, in light of the drug charges Johnson faces in the instant case, the court will not allow the government to impeach him with specific facts of his prior drug felonies or by referring to the nature of these offenses. Rather, the government must only indicate that Johnson had previously been convicted of other unspecified felonies.

**This was a case in which the court appeared to think it was bound by precedent to admit the convictions, and then decided to have mercy by sanitizing the convictions. But there is no precedent that *mandates* admissibility of drug convictions for impeachment of defendants in drug prosecutions. So the sanitization was more of an easy way out, an alternative to rejecting some of the case law head on.**

- **United States v. Barela, 2021 WL 5114406 (D.N.M.):** The defendant was charged with robbing a grocery store, and the government sought to impeach him with prior convictions for aggravated battery and trafficking in a controlled substance. In what appears to be a lawyer's error, defense counsel conceded that the convictions were admissible under Rule 609(a)(1), and sought only that the impeachment would be limited to the fact of the felonies, and the jury would not hear the names of the crimes. The government argued, correctly, that sanitization would rob the convictions of their probative value for impeachment. The court found that the convictions were not very probative and would be unduly prejudicial --- the same arguments that would be made to exclude the convictions entirely. But because defense counsel did not ask for that, the court ruled that it would “allow the Government, if Defendant testifies, to cross-examine Defendant about his two prior felony convictions for the limited purpose of impeaching Defendant's character and testimony. However, the Court will permit the United States

to introduce only that Defendant has two prior felony convictions and the dates of these convictions.”

- **United States v. Blakeney, 2021 WL 1723224 (E.D. Pa.):** In a felon-firearm prosecution, the government sought to impeach the defendant with two convictions: one for intent to distribute a controlled substance and the other for conspiracy to commit burglary. The court stated that most of the factors favored admission:

Three out of the four *Bedford* factors weigh in favor of admitting this evidence here. The kind of crimes involved— possession with intent to distribute and conspiracy to commit burglary—are both probative as to Mr. Blakeney's character for truthfulness. The timing of the convictions do not suggest a lengthy passage of time to allow for a changed character. Mr. Blakeney had just been released from confinement for unlawfully possessing a firearm, and was on probation when the events underlying this indictment occurred. Third, if he testifies Mr. Blakeney's credibility will be important. As both parties concede, Mr. Blakeney's defense will chiefly center on his explanation for the presence of a gun in his car. Conversely, the fourth factor weighs against admitting the evidence because Mr. Blakeney's testimony will be highly important given that the parties identify no other source of evidence that he could use to make the same argument. . . . In the event Mr. Blakeney chooses to testify, he will be placing his credibility directly at issue. Should that occur, the jury may consider evidence of the fact of his prior convictions.

After all that, though, the court dropped a footnote to state that “[t]he Government will be limited to presenting the fact of convictions without embellishment as to the details underlying them.” No explanation was provided for this limitation.

- **United States v. Barnes, 2021 WL 5051367 (D.N.M.):** The defendant was charged with felon-firearm possession. The government sought to impeach him with his prior convictions for larceny, conspiracy to commit larceny, unlawful taking of a motor vehicle (two convictions), tampering with evidence, attempt to commit a felony forgery, and robbery. The court found the forgery conviction automatically admissible. As to the other convictions, the parties agreed that they would be sanitized. The court then evaluated those convictions, and found prior convictions for larceny, conspiracy to commit larceny, unlawful taking of a motor vehicle, and robbery “are sufficiently similar to the charged offenses that a jury could convict Defendant Barnes on the basis of propensity reasoning.” The result of that ruling was that the jury would only hear that there were felonies, but not what crimes were committed. In contrast, the tampering with evidence conviction was not so similar to the crimes as to be unduly prejudicial. But the result of that ruling was *exactly the same*, given the parties’ agreement. The jury could hear about the conviction but not what it was for.

**Note: This case shows the problem of sanitizing. The court considered the probative value and prejudicial effect of the convictions for the actual crime. But that analysis is irrelevant because the jury is never told what the crimes are.**

- **United States v. Jackson, 2020 WL 7063566 (E.D.N.Y.):** In a felon-firearm prosecution, the government sought to impeach the defendant with two prior narcotics convictions. The court found that the narcotics convictions were highly probative of credibility. While the convictions did not appear similar to the firearms charge, the court noted the connection between guns and drugs. But it said that the risk of prejudice “can be eliminated by prohibiting the government from inquiring into the nature or statutory name of the offense, while still allowing it to inquire into the other essential facts, namely the fact of the felony conviction, the date, and the length of the sentence.

**It makes no sense to spend time talking about how narcotics convictions have high impeachment value (which is wrong anyway) and then to give the conviction to the jury without any indication that it is a narcotics conviction.**

- **United States v. Johnson, 2020 WL 406370 (D.N.Mex.):** In a felon-firearm prosecution, the government sought to impeach the defendant with two convictions for drug trafficking. The court found the convictions admissible on the grounds that they were probative of credibility (relying on the presumption in 609(a)(1) that all convictions are probative), and the prejudicial effect was minimized because the convictions were not similar to the crime charged. The court noted that the parties had agreed that the jury would only hear about the fact of the felonies; the court found that “this concession by the parties is proper.”

**United States v. Young, 2019 WL 133268 (D.Mex.):** In a felon-firearm prosecution, the government sought to impeach the defendant with seven felony convictions: robbery with a weapon, attempted robbery with a weapon, attempted robbery with a firearm, aggravated battery with a deadly weapon, assault and battery with a deadly weapon, and obstructing an officer. The court first noted that none of the crimes “can ‘readily ... be determined’ on the record before the Court to involve ‘dishonesty or false statement.’” Thus they were not admissible under Rule 609(a)(2). The court stated that the prior convictions “are not highly probative of Young's character for truthfulness” and that their prejudicial effect was “significant” because they involved violent offenses committed with deadly weapons: “The prior conviction evidence tends to portray Young as a dangerous criminal perhaps always armed with a firearm. The risk that the jury would convict Young, not on the merits of this case but on the merits of his past cases, is substantial.” After all this, the court nonetheless allowed the government to introduce the fact that the defendant had been convicted of seven felonies (even though the jury was already made aware of the fact of the predicate felony).

The opinion shows the court spending a lot of time on balancing and then allowing admissions of the fact of conviction without any ruling that the probative value of the bare convictions outweighed the prejudicial effect. It could be argued that the probative value of a sanitized conviction *never* outweighs the prejudicial effect. The probative value is near zero, because the mere fact of a generic “felony” says very little about the likelihood that the defendant will lie under oath. And the prejudicial effect of a sanitized conviction is disturbingly high for two reasons: 1) The jury will still draw an inference, “once a criminal, always a criminal”; and 2) The jury will speculate about the nature of the conviction and is likely to assume the worst. See McLeod, *Evidence Law's Blind Spots*, 109 Iowa L.Rev. 189 (2023) (reporting on studies indicating that jurors assume the worst when a conviction is sanitized, especially where the defendant is a person of color.

- **United States v. Mayo, 2019 WL 5868262 (W.D.La):** The defendant was charged with possession of ammunition by a felon. The government sought to impeach him with three drug convictions. The government argued that they were admissible because the defendant’s credibility was going to be an important issue. But the court held that the balancing test would have no utility if the importance of the defendant’s credibility was dispositive. The court found the convictions insufficiently probative, but then compromised by allowing the government to refer to the fact of the convictions, with the jury being in the dark about how to assess “felonies” for credibility.

- **United States v. Casarez, 2018 WL 3340871 (D. Nev.):** In a prosecution for carjacking with a firearm, the government sought to impeach the defendant with prior convictions for possession of a stolen vehicle, assault with a deadly weapon, felon in possession of a firearm, and robbery. The court concluded that “the prior convictions are substantially similar to the current charges” and that when that is so, “there is a substantial risk that all exculpatory evidence will be overwhelmed by a jury's fixation on the human tendency to draw a conclusion which is impermissible in law: because he did it before, he must have done it again.” Nor were the violence-based convictions very probative of character for truthfulness. But instead of excluding the convictions, the court sanitized them and the jury was made aware only that the defendant had been convicted of “felonies.”

- **United States v. Washington, 2017 WL 3642112 (N.D. Ill. 2017):** The defendant was charged with being a felon in possession of a firearm after officers allegedly saw him throw a firearm over a fence. The defendant had two prior convictions with which the government sought to impeach his trial testimony: 1) a 2009 conviction for the manufacture and delivery of marijuana and 2) a 2012 burglary conviction. The defendant asked the court to sanitize the convictions by precluding mention of the names of his prior offenses, while the government argued for full use of

the convictions to impeach. In weighing the Rule 609(a)(1)(B) factors, the court noted that marijuana offenses and burglary possessed only modest probative value in connection with truthful testimony. The court noted that the marijuana conviction was somewhat old, but that the defendant had not stayed out of trouble since that time, enhancing probative value. Further, the court found that neither prior offense was identical to the charged offense, reducing unfair prejudice. Still, the court found that defendant's testimony was extremely important because his own version of events constituted his sole defense. Thus, the court decided to allow both felonies to be used to impeach, but required them to be sanitized such that their names and the sentences received could not be mentioned. The court acknowledged that the names of prior offenses could be admitted in usual circumstances but also noted that courts in the Northern District of Illinois "regularly sanitize" impeaching convictions.

- **United States v. Waggy, 2017 WL 3299085 (E.D. Wash. 2017):** The defendant was prosecuted for making telephone calls designed to harass, intimidate, and threaten using obscene and lascivious language and acts. The defendant had three prior convictions potentially available for impeachment: 1) a 2008 harassment conviction; 2) a 2005 harassment/threat to kill conviction; and 3) a 2000 child rape. Acknowledging the inflammatory nature of the 2000 conviction, the government sought to impeach only with the 2008 and 2005 convictions. The court analyzed admissibility using the Rule 609(a)(1)(B) factors, noting that a "close call" should result in exclusion. The court found unfair prejudice too high for the 2008 and 2005 convictions due to their similarity to the charged offense and their salacious nature. *The court ruled that the government could not question the defendant about any of his specific convictions, but could only ask whether he had been convicted of "a felony."*

- **United States v. Dumire, 2016 WL 4507390 (W.D. Va. 2016):** A defendant was charged with being a felon in possession of a firearm, as well as with obstruction of justice arising out of witness intimidation and retaliation resulting in the death of the witness. The defendant had one prior conviction for malicious wounding with a firearm that the government sought to use for impeachment. The court found the prior conviction too similar to the instant offense and found that it would be unduly prejudicial if the jury learned that both incidents involved shooting someone. *The court ruled that it could be used only if the government referred to it as a prior "felony involving a firearm." Thus, the court allowed the conviction to impeach if partially sanitized.*

**It appears from the analysis that if not for the "compromise" the court would actually have excluded the conviction.**

- **United States v. Marquez, 2016 WL 10720983 (D.N.M. 2016):** In a prosecution for methamphetamine distribution, the government sought to use a prior felony conviction for felon-firearm-possession to impeach the defendant's testimony. The court found that telling jurors that

the defendant had a felony conviction would put them on notice that he may not be credible. Although the prior conviction was not similar to the charged drug offenses, the court found prejudice in the fact that a prior conviction for being a “felon in possession of a firearm” would actually reveal two prior felonies to the jury (the 2008 conviction and the predicate felony). The court found that defendant’s credibility was important because his testimony would necessarily contradict other evidence. *After balancing the court allowed sanitized evidence of the 2008 “felony” without the name of the offense to be used to impeach the defendant’s testimony.*

- **United States v. Castelluzzo, 2015 WL 3448208 (D.N.J. 2015):** In a drug distribution conspiracy prosecution, and the government moved for permission to use the defendant’s prior felony convictions to impeach his trial testimony. The defendant had a 2008 theft by deception conviction, a 2008 drug possession with intent conviction, and a 2006 drug possession with intent and felon-in-possession of a firearm conviction. The court found the theft conviction automatically admissible pursuant to Rule 609(a)(2) (which most courts would not do because theft crimes do not contain an element of false statement) and carefully balanced the Rule 609(a)(1)(B) factors with respect to the other convictions. The court noted that the similarity of the prior drug convictions presented significant propensity risk. The court found that the age of the convictions did not diminish their probative value, however, because the defendant remained on probation for the crimes during the current charged conspiracy. Because the defendant’s testimony constituted his only possible defense, his testimony was important and this weighed against admission. Still the court found that the defendant’s credibility would be critical and impeachment important. (So the importance of the defendant’s testimony crossed itself out --- it is important to limit impeachment in order to allow the defendant to testify, but equally important to impeach him). *The court decided to admit the prior drug convictions if the government would agree to characterize them only as “two non-violent felonies.”* The court found that sanitizing the convictions would ameliorate any unfair prejudice --- but the court did not address the problem that sanitizing the conviction renders their probative value inscrutable.

- **United States v. Elder, 2015 WL 13035104 (S.D. Ind. 2015):** A defendant was charged with conspiracy to distribute methamphetamine. He sought to prevent the government from impeaching his trial testimony with two prior felony convictions: 1) a 1997 conviction for operation of a drug enterprise (for which he was released in 2005) and 2) a 2009 conviction for distribution of methamphetamine, arguing that their similarity to his charged offense would cause significant unfair propensity prejudice. The court carefully weighed the Rule 609 factors, finding that drug offenses were not highly probative of veracity, but that the recency of the offenses suggested their relevance to the defendant’s current credibility. The court agreed with the defense that the similarity of the prior convictions to the charged offense was highly prejudicial, but found that the importance of the defendant’s testimony and credibility weighed in favor of admission. The court found the Rule 609 balancing to be a “close call” due to the jury’s need for impeaching information and the potential prejudice to the defendant. The court ultimately found both convictions admissible to impeach *with only the fact of a “felony”*

*conviction and the date revealed* to protect the defendant from a propensity inference (though the jury could still draw a “once a criminal always a criminal” propensity inference).

- **United States v. Thomas, 2015 WL 2341320 (W.D. Wis. 2015):** The defendant was apparently charged with a drug offense, although the nature of the indictment was not described. The prosecution sought leave to impeach the defendant with three prior drug felony convictions pursuant to Rule 609(a)(1)(B) if he chose to testify. The court immediately noted the similarity of the prior convictions to the charged offense, opining that a limiting instruction would likely be ineffective in protecting the defendant from an impermissible propensity inference. Therefore, the court held that the government could use all three felony convictions to impeach, *but only in a sanitized form that did not reveal the nature of the prior convictions to the jury.*

- **United States v. Clayton, 2014 WL 508523 (N.D. Iowa 2014):** The defendant was charged with bank robbery. He had two prior felony theft convictions that the government sought to use for impeachment. The court found that both convictions were probative of the defendant’s honesty under Rule 609(a)(1)(B) only because they were “felonies” and not because of their specific nature, suggesting that their similarity to the current robbery charges could cause propensity prejudice. *Therefore, the court held that the prosecution could cross-examine the defendant only as to whether he had been convicted of “two felonies” without revealing their nature.*

- **United States v. Perez, 2014 WL 3362240 (E.D. Cal. 2014):** The defendant was charged with being a felon in possession of a firearm and ammunition and with the possession of an unregistered firearm after allegedly shooting his son. The defendant sought to preclude the government’s use of his five prior felony convictions for heroin possession, resisting an officer, and assault with a deadly weapon as impeachment evidence under Rule 609(a)(1). *Without analysis of the Rule 609(a)(1) factors, the court held that all five could be used to impeach in a sanitized form that revealed only that the defendant had been convicted of “five felonies.”*

- **United States v. Saquil-Orozco, 2012 WL 2576678 (N.D. Iowa 2012):** The defendant was charged with possession of a firearm by a convicted felon and with being an undocumented person present in the United States after being removed from the country. The defendant sought to prevent the government from impeaching him with a 2007 conviction involving the possession of cocaine with intent to distribute. Although the government expressed an intent to ask him about his prior felony on cross-examination, the government agreed that it would not reveal the nature of the prior conviction. The court analyzed the admissibility of the prior drug conviction under Rule 609(a)(1)(B) and found that, *in its sanitized form*, its probative value outweighed any unfair prejudice and allowed the cross-examination as suggested by the government.



- **United States v. Swint, 2012 WL 3962704 (D. Ariz. 2012):** The defendant was charged with assaulting a federal officer and claimed self-defense. The government sought permission to use the defendant’s 2003 assault conviction under Rule 609 to impeach his veracity if he testified at trial. The defendant opposed the request, arguing that his past assault was not indicative of veracity and that its similarity to the charged offense would create an unfair propensity inference about his violent tendencies. The defendant sought exclusion of the conviction or, at least, sanitized reference to it. *The court held that the government could ask the defendant about the fact of a 2003 “felony” conviction without reference to the nature of the prior crime.*

- **United States v. Durbin, 2012 WL 894410 (D. Mont. 2012):** Although the opinion never specifies the charged offense, it appears that the defendant was prosecuted for drug-related crimes. The defendant moved to exclude his 2008 felony conviction for the delivery of marijuana under Rule 609(a) should he choose to testify. The court analyzed the Rule 609(a) factors, noting that drug crimes are considered to be probative of veracity in the Ninth Circuit. The court found that the recency of the 2008 conviction increased its impeaching value. The court noted that the similarity of the prior conviction to the charged crime created a risk of unfair propensity use that weighed against admission. Finally, the court found that the defendant’s testimony and credibility would be crucial if he testified at trial. The court held that the government could use the 2008 conviction to impeach the defendant, but prohibited the prosecution from revealing the nature of the past offense.

**Comment: Note the inconsistency of emphasizing that drug crimes are probative of veracity, and admitting the conviction partly on that basis, but then depriving the jury (whose role it is to assess credibility) of the information that it was a drug crime. (This is similar to the inconsistency (rectified in 2006) where a court would hold a conviction automatically admissible under Rule 609(a)(2) if it found that the witness lied while committing a non-falsity crime --- a fact that the jury would never know).**

- **United States v. Gomez, 772 F. Supp. 2d 1185 (C.D. Cal. 2011):** The defendant was charged with the possession of methamphetamine with intent to distribute and the government moved for permission to impeach his trial testimony with two prior felony convictions: 1) a 1997 conviction for conspiracy to possess with intent to distribute methamphetamine; and 2) a 2006 felony conviction for false personation. The court first found the 1997 felony within the ten-year time period required by Rule 609 due to the defendant’s release from custody in 2004. The court found the impeaching value of the 1997 conviction diminished by the existence of the more recent 2006 felony that could be used to impeach the defendant. Further, the court noted that the similarity between the 1997 methamphetamine conviction and the instant charges would create a risk of unfair propensity use. Because the

defendant's credibility would be crucial if he chose to testify, however, the court held that the government could impeach with the 1997 felony conviction, but further ordered that "to mitigate the risk of prejudice to defendant, the court will 'sanitize' the conviction and not allow the government to introduce evidence regarding the nature of the felony for which defendant was convicted." Because the 2006 felony conviction for false personation required proof that the defendant purposely and falsely impersonated another for financial gain, the court found this conviction automatically admissible to impeach the defendant's trial testimony under Rule 609(a)(2).

**Comment: Query the necessity of admitting the older conviction after admitting a falsity-based, more recent conviction. It may be that "sanitizing" a conviction is just a way to avoid confronting the fact that its probative value is minimal, but at least the damage is limited.**

- **United States v. Chaco, 801 F. Supp. 2d 1217 (D.N.M. 2011):** The defendant was charged with aggravated sexual abuse of his daughter and sought to prevent the use of four prior felony convictions to impeach his trial testimony: 1) a 2004 robbery conviction; 2) a 2004 breaking and entering conviction; 3) a 2004 false imprisonment conviction; and 4) a 2004 conviction for an attempt to disarm an officer. At a pretrial hearing in which the court suggested its inclination to exclude all of the defendant's prior felonies, the government offered to sanitize the convictions to prevent the jury from learning the names of the prior offenses and agreed to an instruction explaining that none of the past offenses were for sexual assault. In its ultimate ruling on the issue, the court traced the history of felony impeachment, expressed disapproval of the policy permitting such impeachment, but found that some impeachment with prior felonies was clearly consistent with congressional intent. In weighing the Rule 609(a) factors, the court noted that the case amounted to a true credibility contest between the victim and the defendant, thus making the importance of impeachment greater. Despite the defendant's concerns that the jury would perceive him as a "bad person" if he were impeached with his prior felony convictions, the court emphasized that none of the prior convictions were for similar offenses, thereby reducing the risk of unfair prejudice. Because credibility was so crucial, the court determined that it would allow impeachment with "four prior felony convictions," thus sanitizing the convictions consistent with the government's previous offer to do so. The court did not explain why sanitizing the dissimilar convictions was necessary.

**Note that the court was going to exclude, whereupon the government offered the sanitization "compromise."**

- **United States v. O'Neil, 839 F. Supp. 2d 1030 (S.D. Iowa 2011):** The defendant was charged with conspiracy to distribute cocaine and sought to prevent the government from using two prior felony convictions under Rule 609: 1) a 1997 conviction for cocaine distribution; and 2) a 2000 conviction for the delivery of a controlled substance. The court found that all felonies have some impeaching value pursuant to Rule 609, but stated that the nature of the 2000 drug offense did not add to that impeaching value because the prior drug crime did not suggest

dishonesty. The court emphasized the likely propensity prejudice from impeaching with the prior similar drug conviction. The court held that the government could impeach the defendant with the fact of a 2000 “felony conviction” without revealing the nature of that conviction. The court excluded the 1997 conviction as old and similar to the charged offense under Rule 609(b).

**Comment: Here is a case where, if sanitization was not an option, the trial court might have found that the conviction wasn’t admissible at all. Sanitization may or may not on balance be beneficial to the defendant.**

- **United States v. Bruguier, 2011 WL 4708853 (D.S.D. 2011), *rev’d in part on other grounds* 735 F.3d 754 (8<sup>th</sup> Cir. 2013):** The defendant was charged in connection with alleged sexual assaults on minors and incapacitated persons. After his conviction, he moved for acquittal and for a new trial based upon alleged trial errors, including the district court’s decision to allow his impeachment with a prior vandalism felony. In an interesting twist, the defendant claimed that the court’s decision to sanitize the felony caused him prejudice because the jury should have been told that his prior conviction *was not* for sexual assault. The court rejected this contention, finding that the defendant had been free to reveal the nature of his prior conviction to the jury himself during his testimony and that his strategic decision not to do so was not grounds for a new trial.

- **United States v. Harriman, 2010 WL 5477752 (N.D. Iowa 2010):** The defendant was prosecuted for being a felon in possession of a firearm and sought to preclude the government from admitting his 1997 convictions for kidnapping and burglary to impeach his trial testimony. The court found that fewer than ten years had passed since the defendant’s release from custody and that the prior felony convictions were probative of veracity. The court noted that special caution was required for the use of a criminal defendant’s prior convictions and expressed concern about propensity inferences the jury might draw from the nature of the defendant’s past crimes. Therefore, the court allowed the government to impeach the defendant *only with the fact and date of his prior convictions, without revealing their nature to the jury.*

**Comment: The tone of the opinion indicates that if the trial court had not had the sanitization safety valve, it would have excluded the conviction entirely.**

- **United States v. Brown, 606 F. Supp.2d 306 (E.D.N.Y. 2009):** The defendant was charged with conspiracy and with distribution of crack cocaine, as well as a firearms offense. He moved to preclude the government from impeaching his trial testimony with two prior convictions: 1) a 1997 conviction for unlawful possession of a firearm and 2) a 1999 conviction for criminal contempt arising out of the defendant’s attack on a person protected by a court order with an ice pick. The court found that the 1997 conviction was more than ten years old and subject to the stringent balancing test in Rule 609(b). Finding low probative value for the gun offense and high prejudice due to the presence of a gun charge in the instant case, the court excluded Brown’s 1997 felony conviction under Rule 609(b). The court found the 1999 criminal contempt conviction subject to Rule 609(a)(1)(B) and performed a careful analysis of the applicable factors. First, the

court found low probative value of the criminal contempt conviction for impeachment purposes. The court noted that violation of a court order was not necessarily dishonest and that impulsive violence did not suggest a lack of veracity. The court found that the age of the prior conviction further lessened its probative value. The court found significant prejudice as well, noting that both the prior conviction and current charges involved weapons and that an attack with an ice pick is highly inflammatory. Still, the court found that it would be unfair to allow the defendant to take the stand and contradict government witnesses without impeachment, especially because the defense was planning to impeach government witnesses with their prior felony convictions. The court held that a sanitized version of the 1999 conviction that revealed only the fact of a felony conviction, the date, and sentence would be permitted. **Comment: This case is in tension with Second Circuit case law, which questions a court allowing impeachment with convictions where the jury doesn't know what the conviction is for. *United States v. Estrada*, 430 F.3d 606 (2<sup>nd</sup> Cir. 2005). It's also notable that disclosure of the conviction was allowed basically because the defendant was going to impeach prosecution witnesses with prior convictions. That would not be a concern if Rule 609(a)(1) is eliminated.**

### ***III. The Court Excludes All of Defendant’s Felony Convictions Under Rule 609(a)(1)(B)***

Some courts have refused to allow the prosecution to impeach a criminal defendant with any of his or her eligible prior felony convictions under Rule 609(a)(1)(B). This occurs most often in cases where available felony convictions are for offenses that are particularly inflammatory or identical to the charged offense.

- **United States v. Holmes, 2024 WL 411727 (E.D.P.A):** The defendant was charged with Hobbs Act Robbery and firearms offenses. The government sought to impeach him with identical convictions. The court excluded the convictions. The court first noted that the government relied on case law stating that there is a presumption of admissibility of convictions when offered against the defendant under Rule 609(a)(1). Of course that is not true under the terms of the rule. At any rate, the court observed that the case law cited was from outside the Third Circuit. The court noted that in citing those cases, the government ignored an important decision from the Third Circuit which describes this portion of the Rule as “a heightened balancing test and a reversal of the standard for admission under Rule 403,” creating “a predisposition toward exclusion.” *United States v. Caldwell*, 760 F.3d 267, 286 (3d Cir. 2014). The court found that “there is no inherently strong or logical connection between Holmes’ prior convictions—robbery and a firearms offense—and his veracity as a witness. Indeed, it is possible to commit these crimes brazenly, with no deception, despite the seriousness of the offenses.” In contrast, because the crimes were virtually identical to those charged, “[a]llowing such evidence creates a great risk that a jury will draw the impermissible inference that Holmes has a propensity to commit robberies and firearms offenses, rather than considering it as evidence only relevant to his credibility as a witness.” The court found that the factors of importance of the defendant's testimony and importance of his credibility canceled each other out.

Notably, the court also excluded theft convictions of a government witness under Rule 609(b).

- **United States v. Gillard, 2024 WL 247054 (E.D.Pa.):** A defendant charged with drug and firearms crimes sought to exclude firearms and drug convictions under Rule 609(a)(1). The court first observed that Rule 609 was a very “controversial” rule. It found the gun crimes inadmissible because they had “little to no bearing on his character for truthfulness.” The court noted that drug crimes may vary in their probative value as to character for truthfulness, and without having any further information about the prior crime, chose to find it of limited probative value. The prejudice of both the gun and drug convictions was high because of the similarity to the charged crimes. The government offered to sanitize the convictions, but the court rejected this offer, explaining as follows:

While this proposal may reduce possible prejudice, it does not increase the probative value of Mr. Gillard's prior felony convictions as to his character for truthfulness. Instead, the probative value of a prior felony conviction will be *diminished* where the jury is not provided information about the prior conviction that would help in evaluating the extent to which the offense reflects on the defendant's veracity as a trial witness.

**Exactly right.**

- **United States v. Austin, 641 F.Supp.3d 1193 (D. Utah 2023):** The defendant was charged with involuntary manslaughter in Indian Country. The government sought to impeach him with his prior convictions for drug distribution and money laundering. The court stated that “the fact that Mr. Austin was involved in methamphetamine trafficking is not particularly relevant to his character for truthfulness as a witness” and that “a methamphetamine-related conviction is highly damaging and likely to be very prejudicial.” The court further recognized that “allowing Mr. Austin to be impeached by this prior conviction will chill his testimony, which is likely to be important as to his mental state” which was an important issue in the case. The court also noted that while the defendant’s testimony will be important, he planned to call an expert, and so the case is “unlikely to be a swearing contest between witnesses where the centrality of a defendant's credibility and the probative value of his past conviction is heightened.” The court therefore concluded that “the probative value of this evidence does not outweigh its prejudicial effect to Mr. Austin.”

- **United States v. Bennett, 2023 WL 6810439 (W.D.Pa):** The defendant was charged with distributing Fentanyl, and the government sought to impeach her with two Fentanyl convictions. The court applied the four factor test applicable in the third circuit, i.e., “(1) the kind of crime involved; (2) when the conviction occurred; (3) the importance of the defendant's testimony to the case; and (4) the importance of the credibility of the defendant.” The first factor counted in favor of the defendant, because the convictions were identical to the crime charged, and “these non-violent crimes are not crimes of dishonesty or deceit, and therefore have low impeachment value.” The second factor favored the government “since these convictions occurred within the ten year period in Rule 609(a).” [But then wouldn’t that factor always favor the government?] The third factor favored the defendant because her testimony would be important in the case. The fourth factor favored the government, because her credibility would be important and so impeachment would be critical. (So the importance factor and the credibility factor crossed each other out.) The court concluded that because the factors were even at two apiece, and “the Government has the burden of proof, it has therefore failed to show that the probative value of the prior convictions outweighs their prejudicial effect.”

**Comment: This is clearly the right result, because the convictions are not very probative of character for truthfulness, and they are identical to the crime charged. But getting to that conclusion with the four factor test (a 2-2 tie), and treating those factors as all of**

**equal weight, just has to be wrong. The second factor and the fourth factor, as applied by the court, are automatically on the government’s side of the ledger. And these factors clearly should not be of equal weight to actually evaluating the probative value and prejudicial effect of the conviction.**

- **United States v. Elias, 2022 WL 715486 (E.D.N.Y.):** Two defendants were charged with Hobbs Act robbery and use of a weapon to commit the robbery. The government sought to impeach each of them with a conviction. Thompson had a 2016 conviction for possessing a shank while incarcerated on Rikers Island. The court found that conviction inadmissible because it had nothing to do with dishonesty, and was essentially a crime of self-defense, given the situation at Rikers. The conviction was found especially prejudicial because it “inherently reveals an earlier conviction.” The court specifically found that the “importance of testimony” and “importance of credibility” factors worked at cross-purposes. The court concluded that “these factors are not meant to be simply totted up, with points given to each side. The factors must be considered together in light of Rule 609(a)(1)’s overall purpose to provide “strong protection for criminal defendants” by adopting a standard that “favors excluding rather than admitting.” [quoting Mueller & Kirkpatrick, *supra*, § 6.31].

Elias’s conviction was for attempted robbery in 2010. The court concluded that the conviction was remote, and very prejudicial because it was similar to the charged crime. The court also declared that the fact that the conviction resulted from a guilty plea rather than a verdict “weighed strongly” against admission.

- **United States v. Bailey, 2022 WL 2290586 (D.V.I.):** In a drug prosecution, the government sought to impeach the defendant with his prior conviction for unlawfully mailing a firearm. The court found the conviction inadmissible under Rule 609(a)(1). It declared that “[t]he Government has not pointed to any reason why Defendant's prior conviction is particularly probative of his credibility. The Government's reliance on the fact that the statute of conviction involves the *unlawful* mailing of a firearm and that it is a felony does little to advance its cause. Thus, this aspect of the first factor weighs in favor of exclusion because of the minimal probative value of Defendant's prior conviction.” The court considered the age of the conviction. After significant discussion of the proper starting and ending points, it measured from the release from confinement on the prior conviction (analogizing to Rule 609(b)), with the endpoint being the date of trial (which makes sense because the defendant’s character for truthfulness at the time of trial is what is being assessed). Under that measurement, the conviction was six years old. The court stated that “[s]ix years is roughly within the middle of the ten-year period of relevant convictions, making it somewhat probative, but the probative value is diminished.” The court stated that the defendant’s credibility was important, and essentially weighed that factor twice (importance of testifying and contrary importance of exploring credibility) and the factors crossed each other out. The court concluded as follows:

Ultimately, the Court concludes that the four factors—taken together—weigh in favor of exclusion. Under Rule 609(a)(1)(B)’s “heightened balancing test,” the Government has the burden to show that the balance tilts towards inclusion of the prior conviction. Here, the Government has not shown that the evidence makes a tangible contribution to the evaluation of credibility and that the usual high risk of unfair prejudice is not present.

- **United States v. Freeman, 2021 WL 2222735 (N.D. Okla.):** In a murder prosecution, the government sought to impeach the defendant with three convictions: child endangerment by driving under the influence; assault and battery with a dangerous weapon; and child abuse by injury. The court excluded all the convictions. It found that the assault and battery conviction was highly prejudicial because it is “highly similar to the crime” alleged in this case; thus it was “highly likely that the jury will use defendant's assault and battery with a dangerous weapon conviction to infer criminal propensity for inflicting violence by means of a dangerous weapon.” In contrast the probative value of the conviction was low because it said very little about the defendant’s character for truthfulness. As to the child abuse convictions, while not similar to the crime charged, the court found that they were “highly likely to inflame the jury, creating a substantial prejudicial effect. Further, they are likely to have minimal to no probative value because the elements of those crimes also do not go to defendant's truthfulness.”

- **United States v. Ahaisse, 2021 WL 2290574 (N.D. Okla.):** In a prosecution on murder and firearms charges, the government sought to impeach the defendant with a prior conviction for being an accessory after the fact to a different murder. The court found that the conviction had some probative value, because the statute required a showing of active concealment. The court also noted that the conviction was dissimilar from the murder charge, as aiding and abetting did not involve violence. Nonetheless, the court found that admitting the conviction would be highly prejudicial because of the tie to murder. This had an impact on the “importance of defendant testifying” factor, as the court explained:

Next, the Court must assess the likelihood this testimony will be chilled by allowing plaintiff to impeach defendant by prior conviction. Defendant's prior conviction for accessory after the fact to murder second degree is not inherently prejudicial (here, meaning that it is not particularly heinous on its face); however, the Court notes that the prior conviction, like one of the charged crimes, does involve a murder. Because those crimes are evocative of one another, defendant will likely waive his right to testify to avoid the high likelihood that the jury will associate him with a prior murder unrelated to the one with which he is charged. As a result, this factor weighs against admission of the prior conviction, as it is likely to prejudice the defendant by associating him with an unrelated murder.

The court ruled that the conviction was excluded, concluding as follows:



Fundamentally, associating defendant with a prior murder while on trial for an entirely unrelated murder would be wholly inappropriate in this instance, especially in light of the fact that no other factors indicate there would be strong probative value in the admission.

- **United States v. Bernard, 2021 WL 3077556 (E.D. Pa.):** In a prosecution for felon firearm possession, the government sought to impeach the defendant with 2017 convictions for narcotics and resisting arrest. The court excluded both convictions. The court stated that “while a felony conviction has some inherent impeachment value, the connection between [the] drug conviction and Bernard's likelihood of testifying truthfully is attenuated. The same goes for Bernard's conviction for resisting arrest. Nothing about that conviction calls into question Bernard's tendency to testify truthfully. And although the Government conclusorily says Bernard's conviction is probative of his credibility, it provides no specific argument as to why.” The court also noted that the defendant’s only evidence would be his testimony, so it was important to not discourage him from testifying. It concluded that the government had failed to meet its burden under Rule 609(a)(1)(B).

- **United States v. Wilkins, 538 F.Supp.3d 49 (D.D.C. 2021):** In a prosecution for sex trafficking, the government sought to impeach the defendant with three prior convictions, one for assault and battery, one for possession of marijuana, and one for possession with intent to distribute cocaine. The court excluded all three convictions. The court noted that “certain types of felony offenses, that do not involve any false statement by the perpetrator, have been found to not be particularly probative of a witness's credibility.” The court cited case law holding that drug crimes and violent crimes were of little probative value. “As a result, the probative value of Mr. Wilkins's past convictions with regard to truthfulness appears to be minimal.” The court addressed the prejudice from the convictions as follows:

Balanced against this negligible probative value is the significant risk of a prejudicial effect on the jury stemming from the introduction of these past convictions. As has been repeatedly noted, there is a very real risk that a jury will “generaliz[e] a defendant's earlier bad act into bad character and tak[e] that as raising the odds that he did the later bad act now charged.” *Old Chief*, 519 U.S. at 180, 117 S.Ct. 644. This risk is also heightened where, as here, the impeached witness is also the defendant. Nor can this risk of prejudice be appropriately limited by a limiting instruction, as the Government suggests. As this Court has previously recognized, “[w]hen ‘[t]he jury is told to consider the defendant's prior conviction only on the issue of credibility and not on the overall issue of guilt ... the jury [is required] to perform a mental gymnastic which is beyond, not only their powers, but anybody else's.’ ” *Holland*, 41 F. Supp. 3d at 95 (quoting *Lipscomb*, 702 F.2d at 1069). Considering the limited probative value and very real risk of significant prejudice, the Court concludes that the probative value of Mr. Wilkins's convictions for past drug possession, drug possession with intent to distribute, and assault do

not outweigh the prejudicial effect of the introduction of this evidence. Consequently, this evidence is inadmissible for the purposes of impeachment.

- **United States v. Pierson, 2021 WL 1341562 (S.D. Ind.):** In a prosecution for illegal possession of a firearm, the government sought to impeach the defendant with a firearm and a resisting arrest conviction. The court excluded both convictions. The court stated that the convictions had “limited probative value” and expressed concern about “the danger of unfair prejudice arising from the similarity between his prior convictions and the current charge.” The court concluded that “the government has not shown that the probative value of the prior convictions outweighs the danger of unfair prejudice.”

- **United States v. Church, 2017 WL 2180284 (E.D. Pa. 2017):** Two defendants were prosecuted for cocaine distribution offenses. Both had prior felony convictions the government sought to use for impeachment. One defendant had a 2004 conviction for cocaine distribution and the other had a 2011 felony conviction arising from the distribution of cocaine and marijuana. The district court performed a thorough analysis of the Rule 609(a)(1)(B) factors and found the probative value of both drug convictions minimal in demonstrating a character for untruthfulness. The court emphasized that the most important factor was the similarity between the prior convictions and the instant charges. The court excluded both convictions, but noted that the issue could be revisited if either defendant testified in a manner that opened the door to contradiction with the convictions.

- **United States v. Anderson, 174 F. Supp. 3d 1041 (D.D.C. 2016):** The defendant was charged with being a felon in possession of a firearm and ammunition. The government sought permission to impeach the defendant with two prior felony convictions: (1) a 2010 possession of a firearm involving a machine gun and (2) a 2005 attempted possession of cocaine with intent to distribute. Both fell within Rule 609’s ten-year time period and the court analyzed their admissibility pursuant to the Rule 609(a)(1)(B) factors. The court first noted that different convictions possess varying degrees of probative value for impeachment and found that both of the defendant’s prior crimes were crimes of impulse rather than acts reflecting on credibility, making their probative value limited. The court also emphasized the importance of the similarity of the prior convictions and the heightened propensity prejudice suffered by a defendant impeached with a similar past offense. The court found the prior firearm possession highly prejudicial for that reason. The court also noted that, although the prior drug conviction was within the ten-year period required by Rule 609, it was on the cusp and almost stale, thus reducing its probative value. Therefore, the court found that the government had “failed to meet its burden” of demonstrating that probative value was greater than unfair prejudice and excluded both prior convictions.

- **United States v. Washington, 2015 WL 1403887 (N.D. Ill. 2015):** The defendant was charged with possession with intent to distribute, heroin, crack, and marijuana. He was also charged with being a felon in possession of a firearm and ammunition, as well as with using a firearm in connection with drug trafficking. Prior to trial, the government sought permission to impeach the defendant's trial testimony with his 2007 felony conviction for the attempted aggravated discharge of a firearm. The court weighed the requisite Rule 609(a)(1)(B) factors, finding that the prior firearms offense was not a dishonesty crime, but had some slight probative value for impeachment. Because the defendant was released from custody only three years prior to the instant offense, the court found the prior conviction recent and probative for that reason. The court emphasized that the similarity of the prior offense to the firearms counts in the current case weighed heavily against admission due to the risk of propensity use. Finally, the court noted the importance of the defendant's testimony to his defense and found that he would be deterred from testifying if the prior conviction were admitted due to the similarity of the offense and the likely ineffectiveness of a limiting instruction. The court, therefore, found that the probative value of the past firearm offense for impeachment did not outweigh its likely unfair prejudice and ordered the prior conviction excluded.

**Note: This is a case in which the importance of the witness's testimony was evaluated only in light of the interest of allowing the defendant to testify, and not to the countervailing interest in assessing his credibility. So those factors did not end up crossing each other out.**

- **United States v. Valueland Auto Sales, Inc., 2015 WL 300469 (S.D. Ohio 2015):** A company and two individual defendants were charged with federal crimes arising out of the fraudulent reporting of cash deposits on behalf of the company. One of the two individual defendants sought to prevent the prosecution from using a prior conviction for money laundering to impeach his trial testimony. The court weighed the Rule 609(a)(1)(B) factors, finding that the probative value of money laundering was high for purposes of impeachment because it tended to suggest deception. All other factors weighed against admission, however. Because the offense was committed 14 years earlier and the defendant had been released from custody 6 years earlier, the court found the probative value diminished. Due to the similarity between the past conviction for money laundering and the instant reporting charges, the court expressed concern that the prior conviction would be used by the jury to suggest a propensity for improperly handling funds. Finally, the court afforded great weight to the defendant's right to testify in his defense and concluded that any probative value was significantly outweighed by the risk of prejudice. Thus, the court excluded the only conviction the government sought to use to impeach. (Again no cross-out factor seems to be material to the court's determination to exclude the evidence).

- **United States v. Holland, 41 F. Supp. 3d 82 (D.D.C. 2014):** The defendant was charged with conspiracy to distribute and with distribution of cocaine and heroin. The government sought to use two prior felony convictions to impeach the defendant's testimony, an assault conviction and a theft conviction, both of which arose out of a single mugging. The court found that crimes

of violence are not probative of veracity and that the government produced no information suggesting that the assault involved any falsehood. Although the court acknowledged that theft involves disregard of the rights of others and may have more probative value with respect to a testifying defendant's veracity, the court found the probative value of the defendant's theft conviction "minimal" where it arose out of the same mugging as the assault and involved no falsehood. The court found that limiting instructions designed to confine the evidence to impeachment required "mental gymnastics" a jury cannot perform.

- **United States v. Willis, 2014 WL 2589475 (N.D. Ok. 2014):** The defendant was charged with Social Security fraud after representing that he lived alone, while allegedly living with his wife. Prior to trial, the defendant sought to preclude the prosecution from introducing his two prior felony convictions to impeach his important trial testimony that he did, in fact, live alone at the relevant time: 1) a 2002 conviction for cocaine distribution (with a 2010 release from prison) and 2) a 1987 conviction for forgery. The court excluded both convictions after carefully evaluating the Rule 609 factors. The court found that cocaine distribution was not particularly probative of veracity and that the offense was old. Although the court noted that drug distribution was not similar to Social Security fraud and created little propensity prejudice, the court found the defendant's testimony important to his defense. The court also emphasized that the government would call numerous witnesses who would contradict the defendant's testimony about his residence, reducing the need to impeach the defendant with his prior drug conviction. The court explained that the forgery conviction would be automatically admissible but for its age and weighed probative value against unfair prejudice under Rule 609(b). Notwithstanding the impeaching value of a forgery conviction, the court found that its age and similarity to the current offense weighed heavily against admission and excluded it as well.

- **United States v. Douglas, 2012 WL 361694 (D. Minn. 2012):** The defendant was charged with possession of a firearm by a convicted felon and sought to preclude the use of multiple prior convictions for assault, aggravated robbery, and burglary as impeachment evidence. The court rather summarily found that none of his many priors were indicative of a lack of veracity and found significant propensity prejudice because many of the prior crimes involved the defendant's use of force and the instant charges involved the possession of a firearm. Thus, without analyzing them one by one, the district court excluded all of the defendant's prior convictions under Rule 609.

- **United States v. Sparks, 2012 WL 5878094 (S.D. Ind. 2012):** The defendant was prosecuted for being a felon in possession of a firearm. The prosecution sought permission to impeach the defendant with two prior felonies: 1) a 1995 conviction for being a felon in possession of a firearm and for unlawful possession of a sawed-off shotgun and 2) a 1986 perjury conviction. Due to the date of release, the court analyzed the 1995 conviction under Rule 609(a)(1)(B) and found that the prior similar conviction posed a grave risk of prejudice to the defendant. Although the government argued that the defendant's credibility would be important and that it needed some

impeachment information, the court stated that it could not imagine the jury using this prior conviction for anything but propensity. The court also noted that the jury would be aware that the testifying defendant was “a felon” due to the nature of the instant prosecution. Therefore, the court excluded the prior felon-in-possession conviction. The court analyzed the 1986 perjury conviction under Rule 609(b) due to its age, finding the probative value of the twenty-six year-old conviction insufficient to overcome the more stringent balancing test in that provision. Thus, both of the defendant’s prior felonies were excluded under Rule 609.

- **United States v. Cunningham, 2012 WL 12865641 (W.D. Mich. 2012):** The defendant was charged with assault of a federal officer, arising out of a U.S. Marshall’s attempt to arrest the defendant as a parole absconder. The government sought to use the defendant’s 2004 felony conviction for prison escape to impeach his testimony at trial under Rule 609(a)(1)(B). The court further found that the prior escape was not very probative of veracity. It noted that the defendant had six previous dishonesty crimes that would be automatically admissible to impeach him under Rule 609(a)(2) and that the existence of these impeaching offenses further lowered the probative value of the escape felony. Although the escape offense was only seven years old, it remained less probative of veracity than the more recent dishonesty offenses. The similarity of the prior felony to the charged offense weighed strongly against admission and, although impeachment of the defendant would be important, the dishonesty offenses would provide the government with an adequate opportunity. Thus, defendant’s motion *in limine* to exclude his 2004 escape conviction under Rule 609(a)(1)(B) was granted.

**Comment: This is just a case in which the government was greedy. They were already going to impeach the defendant with six automatically admissible convictions. And yet they wanted to also impeach with a conviction that was similar to the crime charged. In these circumstances, the argument that the conviction is necessary for, and will be limited to, impeachment, seems disingenuous.**

- **United States v. Vasquez, 840 F. Supp. 2d 564 (E.D.N.Y. 2011):** A defendant was charged with being a felon in possession of a firearm. The government sought to use three prior felony convictions for the attempted sale of controlled substances in 1999, 2003, and 2005 to impeach the defendant’s trial testimony. The court carefully analyzed the Rule 609(a)(1)(B) factors, noting that some drug crimes may be indicative of dishonesty. Although the defendant’s street sales of drugs were more probative of veracity than mere possession offenses, they were far less probative than drug trafficking crimes. Thus, the court found probative value “moderately low.” The court found the 1999 and 2003 convictions less probative due to their age. The court found unfair prejudice high for all three prior convictions because the jury might decide that the defendant was guilty of the charged gun offense because he was a drug dealer, due to the common association between guns and drugs. Although the court acknowledged that the defendant would contradict the government’s witnesses and that his credibility was important, the court noted that the jury would already know that the

defendant was a “felon” due to the felon-in-possession charge and the stipulation to that effect. Therefore, the court found that probative value for impeachment could not outweigh unfair prejudice and excluded all three felonies for impeachment.

- **United States v. Alexander, 2011 WL 6181434 (E.D. Mich. 2011):** The defendant was prosecuted on drugs and weapons charges. After learning that the defendant intended to testify to a “mere presence” defense, the government sought to use his 2007 conviction for marijuana delivery to impeach under Rule 609(a). Due to the similarity of the past conviction to the charged offense, the court excluded the prior drug conviction under Rule 609(a)(1), stating that the government could not impeach with it unless the defendant somehow opened the door by denying past connections with drugs during his direct testimony.

- **United States v. Hoffman, 2010 WL 1416869 (S.D. W. Va. 2010):** The defendant was charged with a criminal violation of the Restoration, Conservation & Recovery Act (RCRA) arising out of the unlawful storage of hazardous materials in connection with an electroplating business. The government sought permission to use the defendant’s 1999 conviction for violation of the Clean Water Act by unlawfully disposing hazardous materials in connection with a similar business enterprise. The court rejected the government’s efforts to admit the 1999 conviction for impeachment purposes, stating that it had no probative value and could only be admitted if the defendant’s direct testimony was contradicted by the prior conviction.

#### ***IV. The Court Admits Some, But Excludes Other Felony Convictions Under Rule 609(a)(1)(B)***

Some courts compromise by admitting some, but not all, prior felony convictions eligible for impeachment under Rule 609(a)(1)(B). Some of these courts apply a careful analysis in choosing admissible felonies, while others call balls and strikes more summarily.

- **United States v. Barker, 2023 WL 2663241 (E.D. Okla.):** In a murder prosecution, the government sought to impeach the defendant with two felony convictions for assault and battery, one felony conviction for preventing a witness from attending court, and one felony conviction for possession of a firearm. The defendant first argued for sanitization of the convictions, but the court rejected that as an option. It stated: “The well-settled rule in this circuit is that the permissible scope of cross-examination under Rule 609 extends to the essential facts of convictions, the nature of the crimes, and the punishment.” Proceeding to the balancing factors, the court found that the two assault and battery convictions “do not involve characteristics that would go to Defendant’s capacity for truthfulness. Crimes of violence, generally, have little impeachment value.” Similarly, “the felon in possession of a firearm conviction does not have the impeachment value of a crime involving dishonesty.” In contrast, the conviction for preventing a witness from attending court, while not automatically admissible because the elements do not require proof of a dishonest act or false statement, was nonetheless probative of character for truthfulness. As to prejudice, the prior convictions for felon in possession of a firearm and preventing a witness from attending court “are plainly dissimilar to the current charged crime of murder.” The prior convictions for assault and battery “do, however, have some similarity to the charged crime because they both involve acts of violence” --- accordingly there was a greater risk of unfair prejudice as to those convictions. Putting everything together, the court held that the firearm conviction and the conviction for preventing a witness from testifying in court would be admissible for impeachment, but the assault and battery convictions would not. The most important factor to the court was, therefore, the similarity or dissimilarity of the conviction to the crime charged.

- **United States v. Thomas, 2023 WL 4585919 (N.D. Okla):** In a case involving sex trafficking and firearms violations, the court found that prior convictions for aggravated assault and firearms violations would not be admissible to impeach the defendant. But convictions for possession of controlled substances and attempted robbery would be admissible. The dividing line between admissibility and inadmissibility was the similarity or dissimilarity of the convictions to the crime charged.

- **United States v. Bracy, 2022 WL 17801133 (E.D.N.Y.):** The defendant was charged with (1) conspiring to distribute and possess with intent to distribute a controlled substance, (2) possessing, brandishing, and discharging a firearm during a drug trafficking crime, and (3) being

a felon in possession of a firearm and ammunition. The government sought to impeach him with two prior drug-related convictions. The court found that one of the convictions should be admitted because the jury was already going to hear about it, as it was a predicate for one of the charges. Thus, while the probative value was low, so was the prejudicial effect. But the court excluded the second conviction, which the jury would hear about only if allowed for impeachment. The court stated: “Once a prior felony has been presented to the jury, the incremental probative value of additional convictions may be diminished.”

- **United States v. Tate, 2022 WL 130821 (S.D. Ind.):** In a narcotics prosecution, the court held that the following convictions would be admissible for impeachment: Robbery resulting in serious bodily injury; battery; possession of a firearm; Failure to Return to Lawful Detention; and Unlawful Possession of a Syringe. But the court excluded two convictions: 1. A cocaine conviction from 2005 (which was probably excluded under Rule 609(b)); and 2. A conviction for possession of a controlled substance. As to those convictions, the determining factor, according to the court, was their similarity to the charged crime.

- **United States v. Jessamy, 404 F.Supp.3d 671 (M.D. Pa. 2020):** The defendant was charged with possession of contraband (a shank) in prison. The government sought to impeach him with a conviction for discharging a firearm and a conviction for reckless endangerment. The court reviewed the relevant factors and concluded that the majority of the factors weighed in favor of admissibility for the discharging a firearm conviction, but against the admissibility of the reckless endangerment conviction. The firearms conviction was about conduct unlike the shank incident in prison, whereas the reckless endangerment conviction was precisely like the conduct underlying the charge in this case.

- **United States v. Carey, 2019 WL 6492566 (M.D. Pa.):** In a drug prosecution, the court held that the following convictions could be admitted to impeach the defendant: 1) drug distribution; 2) theft; and 3) taking property from another by force. In contrast, the court found that a prior conviction for escape would not be admissible. The court’s distinction was one of probative value --- the first three convictions gave off a whiff of underhandedness, whereas the escape conviction was not at all related to honesty. The court specifically said that the probative value of the drug conviction was so high that it would be admissible even though it was substantially similar to the crime charged --- and even though the defendant was already being impeached with other convictions.

- **United States v. Trejo, 2018 WL 4773106 (D.N.Mex.):** The defendant was charged with firearms offenses relating to a serious injury imposed on his girlfriend in a shooting incident. The government sought to admit a conviction for aggravated assault and battery on a family member, and a conviction for drug offenses. The court excluded the assault and battery



conviction, but found the drug conviction to be admissible. The distinction in admissibility was based on similarity/dissimilarity to the charged crime of violence.

- **United States v. Jett, 2017 WL 466286 (S.D. Ind. 2017):** It appears that two defendants were charged in connection with a bank robbery and the government sought permission to use the prior felony convictions of one to impeach his trial testimony. The defendant had one prior bank robbery conviction and another for unlawful use of a firearm in connection with a crime of violence. The court analyzed both felonies under Rule 609(a)(1)(B), excluding the bank robbery conviction due to its low probative value for veracity and its high risk of propensity prejudice in the defendant’s trial on the same charge. The court stated that the bank robbery conviction should be excluded under the Rule 609(a)(1)(B) balancing test even though it was a “close call.” The court allowed evidence of the firearm conviction notwithstanding the use of a “pellet gun” in the charged offense, finding that credibility and impeachment were important and that the past conviction and the instant offense were sufficiently dissimilar such that unfair prejudice would not be great.

- **United States v. North, 2017 WL 5185270 (N.D. Ga. 2017):** The defendant was charged with carjacking, discharging a firearm, and unlawful possession of a firearm by a felon after allegedly shooting a man and stealing his car. The defendant had six prior felonies that the government sought to use to impeach the defendant’s trial testimony: 1) a 1985 aggravated assault, battery and criminal interference with property conviction; 2) a 1987 aggravated assault and felon-in-possession of a firearm conviction; 3) a 1995 felon-in-possession of a firearm conviction; 4) a 1998 armed robbery, aggravated assault, and felon-in-possession of a firearm conviction; 5) a 2004 possession of cocaine with intent to distribute conviction; and 6) a 2013 possession of cocaine and heroin with intent to distribute conviction. The court found that all convictions prior to 2004 were not admissible for the purpose of impeachment because they were governed by Rule 609(b) and were old and similar to the charged offense (although several of them would be admissible under Rule 404(b)). The court analyzed the remaining 2004 and 2013 drug convictions under Rule 609(a)(1)(B). The court found that the defendant’s credibility would be critical where he would have to contradict his alleged victim to defend himself. The court found that drug convictions were not unduly prejudicial in nature. (The court did not discuss the effect of the other felon-in-possession convictions on the probative value of these drug convictions, nor did it address potential connections between guns, carjacking and the drug trade). The court found both drug convictions admissible along with a limiting instruction explaining their impeachment purpose.

- **United States v. Figueroa, 2016 WL 126369 (D.N.J. 2016):** The defendant was charged with being a felon in possession of a firearm and the government sought to use two prior felony convictions to impeach his trial testimony: 1) a 2010 conviction for possession of drugs in close proximity to a school and 2) a 2000 conviction for the receipt of stolen property. The court carefully weighed the Rule 609(a)(1) factors in assessing the admissibility of the drug possession

conviction, noting that the relevance of prior convictions to veracity falls along a continuum. The court found the probative value of narcotics convictions in the middle of that continuum, explaining that convictions for mere possession are even less probative of veracity than crimes involving distribution. The court noted that the prior drug possession was not identical to the charged felon-in-possession offense, but found some propensity risk due to the association between guns and drugs. Still, the court found that the jury would need information to assess the defendant's credibility if his testimony turned the trial into a swearing match between law enforcement officers and himself, and the court noted that the nature of the prior offense would give the jury important information in assessing its impact on the defendant's credibility. Where the jury would already know the defendant was a "felon" as a result of the current charges, the court found that any prejudice in telling the jury that he was convicted of a drug offense was outweighed by probative value to impeach. Thus, the court found the prior conviction admissible to impeach, but cautioned that the government should make no mention of the "school zone" where the possession offense was committed. The court analyzed the 2000 receipt of stolen property conviction under Rule 609(b) and found the probative value of the older conviction inadequate to survive the more stringent balancing in that provision, particularly because the government would be permitted to use the 2010 drug conviction to impeach the defendant's testimony.

**Note: This is a careful balancing and it makes the important point that 609(a)(1) convictions run a long a spectrum of probative value in impeaching a witness's character for truthfulness. That insight raises substantial questions about "sanitization compromise" under which the jury is just told that the defendant has a felony conviction without being told what it is.**

- **United States v. Wilson, 2016 WL 2996900 (D.N.J. 2016):** The defendant was prosecuted for being a felon in possession of a firearm. The defendant had two prior felony convictions potentially eligible for admission through Rule 609(a)(1)(B): 1) a 2004 conviction for heroin distribution; and 2) a 2004 conviction for receiving stolen property. The court carefully analyzed the probative value of the heroin conviction under Rule 609(a)(1)(B), finding that drug offenses are not very probative of veracity. Conversely, the court found the unfair prejudice of the heroin conviction to be high, emphasizing that jurors may associate drugs and guns. The court found that it was important to allow the defendant to testify and present a defense, and so concluded that the probative value of the heroin conviction could not overcome prejudice and excluded it. The court next weighed the receipt of stolen property conviction, finding that knowing receipt of stolen property implies dishonesty that may have impeachment value. Because the receipt of stolen property offense was not similar to or associated with the charged gun offense, the court found less unfair propensity prejudice. Although the conviction was older, there was a continuing criminal history suggesting that it retained its probative value as to defendant's credibility. Although allowing the defendant to testify was important, that testimony would set up a credibility contest with testifying officers. Accordingly, the court allowed the defendant to be impeached with his 2004 receipt of stolen property conviction only.

- **United States v. Steele, 216 F. Supp. 3d 317 (S.D.N.Y. 2016):** In the defendant's prosecution for being a felon in possession of a firearm, the government sought to impeach the defendant with three prior felony convictions pursuant to Rule 609(a)(1)(B). The government sought to use two previous possession with intent to deliver illegal narcotics convictions and one prior first degree robbery with a firearm conviction. The court ruled that the robbery conviction could be used to impeach after noting that crimes of violence do not indicate dishonesty, but that crimes of theft usually do. The court found that the prejudice from impeachment with the robbery would be minimal where the facts were not similar to the instant offense and where the government would use only the date and statutory name of the offense to impeach. (The court did not discuss the "firearms" component of the prior robbery offense or why its similarity would not be prejudicial). The court ruled that narcotics convictions rarely indicate dishonesty and found that the government had provided no facts indicating that the drug convictions bore on defendant's veracity. Thus both prior drug convictions were excluded.

- **United States v. Waller, 2016 WL 1746057 (N.D. Ga. 2016):** The defendant was charged with being a felon in possession of a firearm and the prosecution sought to use five prior convictions to impeach him: 1) a 2008 felon-in-possession of a firearm conviction; 2) two 2008 burglary convictions; 3) a 2013 felon-in-possession of a firearm conviction; and 4) a 2013 conviction for possession of methamphetamine and marijuana with intent to distribute. The court first found that the defendant's credibility would be critical if he chose to testify because he would necessarily contradict the testimony of the arresting officers. This added probative value to his prior convictions. The court noted that the similarity of the prior firearms convictions weighed against admitting them, but did not "preclude" admission. The court suggested that the similar prior convictions could reflect negatively on the defendant's honesty due to his motivation to lie to avoid punishment again for a similar offense. Ultimately the court held that both of the 2013 convictions for drug possession with intent to distribute and for unlawful possession of a firearm would be admitted because they were recent and the defendant's credibility was central to the defense. The court held that one of the two 2008 convictions for burglary could be used to impeach because of the connection between burglary and dishonesty. The court excluded the second 2008 burglary and the 2008 felon-in-possession convictions as cumulative and prejudicial. Therefore, the court allowed three of the defendant's five prior convictions, including one for an offense identical to the charged offense to be used for impeachment.

**Comment: It seems dangerous to reason that the similarity to the crime charged is a reason for *admitting* a prior conviction for impeachment --- the idea being that the defendant would be especially motivated to lie in order to avoid conviction for the same crime (thus perhaps facing sentencing enhancements?). That thinking counteracts the prejudice and could result in routine admissibility of convictions that are identical to the crime charged. If that theory is employed, it should at least be limited to a finding of marginal probative value --- not the probative value of being self-interested, but the marginal probative value of being more self-interested than the defendant is in all cases where they are charged with a crime.**

- **United States v. Barr, 2015 WL 6870062 (D.N.J. 2015):** The defendant was charged with possession of a firearm and ammunition by a convicted felon. The government sought permission to impeach the defendant’s trial testimony with two prior felony convictions: 1) a 2011 conviction for the manufacture and distribution of heroin and cocaine and 2) a 2013 conviction for the possession and distribution of drugs in a school zone. The court carefully analyzed the Rule 609(a)(1)(B) factors, finding that drug dealing requires planning and secrecy that is quite relevant to credibility. Because prior drug dealing was not identical to the charged offenses, the court found that there would be no classic propensity problem in using these priors to impeach. That said, the court noted the common association between drugs and guns and cautioned that the government could make no reference to the narcotics trade in the neighborhood where the defendant was apprehended in connection with the instant gun charges. Because both prior convictions were recent, the court found both relevant to the defendant’s credibility at trial. The court also noted the importance of the defendant’s testimony and credibility where his defense would come down to a “swearing contest” between the defendant and the arresting officers. The court noted that allowing both recent prior convictions would give the jury a more complete picture of the defendant’s credibility, but determined that the incremental impeachment value of the second conviction would not outweigh the unfair prejudice of a “career criminal” or “bad apple” inference the jury might draw. Therefore, the court allowed the government to use only the defendant’s 2013 distribution of narcotics conviction to impeach him and cautioned against any mention of the school zone where that prior offense took place.

- **United States v. Bailey, 2015 WL 7013545 (N.D. Iowa 2015):** The defendant was charged with cocaine distribution and the government sought to use four prior felony convictions to impeach his trial testimony. The court excluded a ten year-old obstruction of justice conviction as too remote (even under Rule 609(a)(1)(B)), but found two aggravated misdemeanor convictions for “harassment and neglect,” which were punishable by more than one year in prison, admissible. The court stated that these convictions would be more probative than prejudicial with appropriate limiting instructions. Finally, the court found a seven year-old conviction for a cocaine conspiracy admissible to impeach. The court did not analyze the prejudice caused by the admissibility of this similar prior conviction, but found that its recency had “less of a distorting influence on its probative nature and prejudicial impact.” Thus, the court admitted three of four proffered prior convictions, including a similar cocaine offense.

**Comment: The error here was in admitting the misdemeanor convictions. Misdemeanors are not admissible under Rule 609(a)(1).**

- **United States v. Alexander, 2014 WL 64124 (N.D. Ill. 2014):** The defendant was charged with conspiracy to possess and with attempted possession of cocaine with intent to distribute. The government sought to impeach his trial testimony with six prior felony convictions, a 2011

aggravated assault conviction and five prior drug possession and distribution convictions dating from 2006 back to 2002. The court first considered the four most recent drug convictions under Rule 609(a)(1)(B). Although the court noted the similarity of these past offenses to the charged offense, the court found that the defendant's credibility would be critical at trial where he was expected to testify about interactions with a confidential informant and where he would likely contradict the testimony of other witnesses. For this reason, the court held that all four prior drug offenses could be used to impeach his trial testimony because their probative value outweighed prejudice. The court found the 2011 aggravated assault conviction more probative of veracity than the drug convictions due to its recency and less prejudicial to the defendant due to its dissimilarity to the charged offense. The court reserved ruling on its admissibility to impeach, however, until the government provided information about the punishment for the assault to show that it qualified as a Rule 609(a)(1)(B) felony. Finally, the court excluded the fifth and oldest drug possession conviction, explaining that it could fall under the more stringent Rule 609(b) balancing test and that its age, similarity, and cumulative nature precluded its use.

- **United States v. Ollie, 996 F. Supp. 2d 351 (W.D. Pa. 2014):** The defendant was charged with an offense arising out of an alleged burglary and the government sought permission to use three prior felony convictions to impeach his trial testimony: 1) a 1988 forgery/theft by deception conviction; 2) a 2012 falsification of a firearms record conviction; and 3) a 2012 burglary/theft conviction. The court excluded the 1988 forgery conviction, finding that its probative value to show a lack of veracity could not overcome prejudice given its age and the admissibility of other convictions to impeach the defendant. The court found the 2012 falsification of a firearms record automatically admissible to impeach under Rule 609(a)(2) as a crime requiring an element of dishonesty. The court also admitted the 2012 burglary conviction, finding that burglary suggested a lack of veracity and noting the recency of the conviction and the importance of the defendant's credibility. Although the court acknowledged "prejudice" resulting from the similarity of the prior conviction to the charged offense, the court nonetheless found the recent prior burglary admissible to impeach the defendant's trial testimony pursuant to Rule 609(a)(1)(B).

**Comment: Is it really necessary to admit an identical crime to impeach a witness who is already being impeached by a crime that contains an element of false statement? One would think this would be a classic situation in which probative value is marginal and prejudice outweighs it.**

- **United States v. Rivas, 2013 WL 5700742 (N.D. Ill. 2013):** The defendant was charged with drug distribution offenses involving both cocaine and marijuana, as well as with firearms offenses. After being convicted at trial, he moved for a new trial based, in part, on the admission of his 2004 felony conviction for the distribution of cocaine for impeachment purposes. The district court denied the motion for new trial and found that her ruling with regard to impeachment under Rule 609(a)(1)(B) was appropriate. Specifically, the court noted that the government had sought to use three prior drug convictions to impeach the defendant's testimony. She excluded two due to their similarity to the charged offense and the cumulative prejudicial effect of multiple drug

convictions. Still, she held that the defendant's credibility at trial was crucial and that it was important for the government to be able to impeach him with one of his prior convictions, notwithstanding its similarity to the charged offense.

- **United States v. Lane, 2013 WL 3759903 (D. Ariz. 2013):** The defendant was charged with offenses involving controlled substances analogues and sought to prevent the government from impeaching his trial testimony with two prior felony convictions: 1) a 2000 bank robbery conviction (with a 2007 release date) and 2) a 1989 fraud conviction (with a 1994 release date). The court analyzed each conviction using the relevant Rule 609 factors, first noting that the fraud conviction fell outside the requisite ten-year time period and could only be admitted if it satisfied the stringent balancing test in Rule 609(b). The court concluded that the twenty-plus year-old fraud conviction lacked sufficient probative value to overcome that high hurdle and excluded the dishonesty crime. The court noted that the bank robbery was indicative of veracity (why?) and was committed only four years prior to the offense in the instant case, increasing its impeaching value. The court also emphasized that the defendant's credibility and knowledge would be critical if he testified in his own defense, further enhancing probative value. Therefore, the court found that the probative value of the bank robbery conviction outweighed any unfair prejudice and held that the government could cross-examine the defendant as to the fact of his bank robbery conviction and the date of conviction.

- **United States v. Boyce, 2011 WL 5078186 (N.D. Ill. 2011):** The defendant was charged with being a felon in possession of a firearm and ammunition. Anticipating that the defendant would take the stand to contradict the version of events provided by his arresting officers, the prosecution sought permission to impeach the defendant's testimony with seven prior felony convictions: five convictions in 1990 for aggravated battery, robbery, and armed robbery, one in 1994 for unlawful use of a weapon, and one in 2002 for drug dealing. The court found that none of the prior convictions involved dishonesty, but also found that the prejudice from impeachment would be diminished where the jury would already know the defendant was a felon due to the nature of the instant charges. The court found the defendant's credibility central to the case in light of his anticipated defense and found impeachment important. That said, the court excluded all but the 2002 drug dealing conviction, finding that the remaining convictions were outside the Rule 609(a)(1) time limitation. The court found that impeachment with the 2002 conviction was appropriate under 609(a)(1)(B) because the prosecution needed at least one prior conviction to question the defendant's credibility. Because the 2002 conviction was available for impeachment, the court found that defendant's multiple old felonies should be excluded.

- **United States v. Evans, 82 Fed. R. Evid. Serv. 878 (E.D. Ill. 2010):** Three defendants were charged with bank robbery and with the use of a firearm in furtherance of a robbery. One of the three also was charged with being a felon in possession of a firearm. Two of the three defendants sought to exclude evidence of their prior felony convictions to impeach their trial

testimony. The defendant who was charged as a felon in possession of a firearm sought to exclude eight prior convictions for cocaine delivery, aggravated battery, unlawful possession of a firearm, aggravated assault, drug possession, and possession of a stolen vehicle dating back to 1990. Addressing the Rule 609(a) factors, the court found that five of the eight offenses committed in the 1990's should be excluded at trial. The age of these convictions, as well as the availability of more recent convictions reduced their probative value significantly. The three remaining convictions in the 2000's for possession of drugs, possession of a stolen vehicle, and aggravated assault all were admitted for impeachment purposes. The court found possession of a stolen vehicle highly probative of veracity and noted the recency of all three of these convictions. Because none of these past offenses were similar to the bank robbery charges in the instant case and because the defendant's credibility would be crucial, the court held that all three could be admitted if the defendant chose to testify. A second defendant sought to exclude two 2008 convictions for drug possession, arguing that they had little bearing on his veracity and could cause the jury to infer that he had a propensity to commit crime. Because the convictions were only two years old, were not similar to the charged bank robbery, and would give the jury much-needed information in assessing the defendant's credibility, the court found both admissible to impeach.

- **United States v. Hampton, 2009 WL 2431291 (C.D. Ill. 2009):** The defendant was charged with being a felon in possession of a firearm. The government sought to use three prior felony convictions to impeach his trial testimony: 1) a 2007 conviction for aggravated battery of an officer; 2) a 1999 conviction for aggravated battery of an officer; and 3) a 1999 conviction for home invasion. Arguing that he had to testify to explain away his confession to the current charges, the defendant sought to exclude all three or to sanitize them if admitted. *The government opposed any sanitization, claiming that the jury needed to know the nature of the prior convictions to assess their effect on the defendant's credibility.* Without analysis, the court agreed with the government that some evidence of the defendant's prior convictions was needed to impeach his testimony, found that two prior felonies were sufficient to impeach, and admitted the 2007 aggravated battery conviction and the 1999 home invasion to be used without any sanitizing.

- **United States v. Gulley, 2010 WL 3834612 (C.D. Ill. 2010):** The defendant was charged with distribution of crack cocaine and sought to exclude evidence of two prior felony convictions: 1) a 2003 conviction for delivery of a controlled substance and 2) a 2006 conviction for possession of a controlled substance. The court noted the Rule 609(a)(1)(B) factors, but was persuaded by the government's argument that the defendant's credibility would be critical at trial and that some impeaching evidence of his past crimes should come in. That said, the court found that one of the two convictions would be adequate for impeachment if the defendant chose to testify and held that the most recent 2006 conviction for the possession of a controlled substance could be admitted, including the nature of the crime charged.

- **United States v. Blake, 2010 WL 3025584 (C.D. Ill. 2010):** The defendant was charged with distribution of crack cocaine and with being a felon in possession of a firearm. He sought to exclude evidence of two prior felony convictions for impeachment purposes: 1) a 2007 conviction for possession of a controlled substance and 2) a 2002 conviction for possession of a controlled substance. The court noted the Rule 609(a)(1)(B) factors, but was persuaded by the government’s argument that the defendant’s credibility would be critical at trial and that some impeaching evidence of his past crimes should come in. That said, the court found that one of the two convictions would be adequate for impeachment if the defendant chose to testify and held that the most recent 2007 conviction for the possession of a controlled substance could be admitted, including the nature of the crime charged.

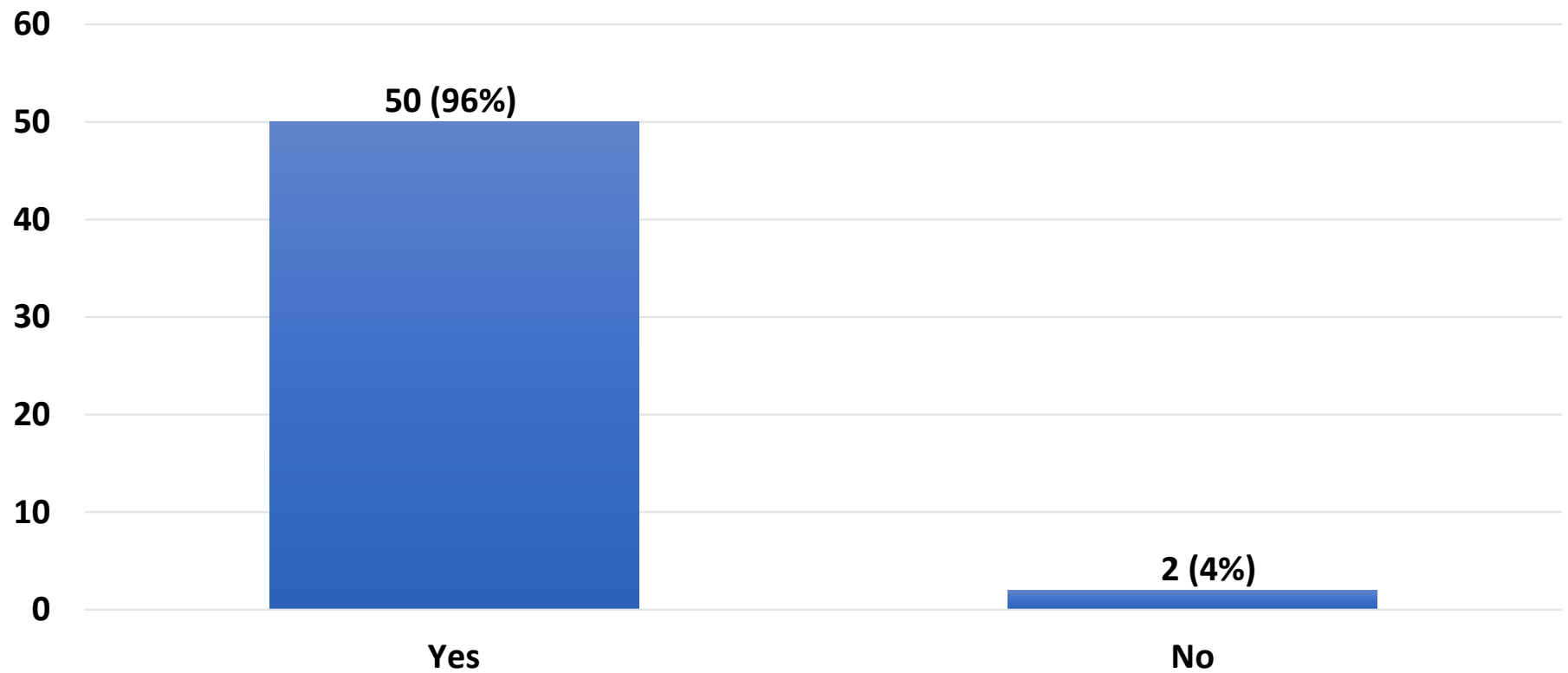
- **United States v. Wooten, 2010 WL 3614922 (S.D. Ill. 2010):** The defendant was charged with possession with intent to distribute cocaine and sought to preclude the government’s use of his felony convictions in 1996 and 1998 to impeach his trial testimony. Because the government did not seek to use the 1996 conviction, the court granted the defendant’s motion with respect to that conviction. The defendant had been released from confinement in 2008 for his 1998 conviction for cocaine distribution, making it eligible for admission under Rule 609(a)(1)(B). In analyzing the relevant factors, the court found that all felonies have some impeaching value. The conviction remained sufficiently recent because of the defendant’s release from confinement only two years prior to the instant offense. The court noted the similarity of the prior drug crime to the current drug charges and noted the special caution warranted by such similarity. That said, the court stated that similarity did not require exclusion and was only one of several factors to be considered. The court found the defendant’s credibility to be extremely important because he would likely contradict other witnesses in his testimony. The court found that the probative value of the prior drug conviction outweighed any prejudice and ruled that it would be admissible to impeach the defendant.

- **United States v. Baker, 2009 WL 3672061 (C.D. Ill. 2009):** The defendant was charged with the possession of crack cocaine with the intent to distribute and the government sought permission to impeach his trial testimony with his 1999 and 2000 felony convictions for narcotics delivery. Without detailed analysis or mention of the similarity between the prior convictions and the charged offense, the court agreed with the government that the prior convictions had impeachment value. The court found that one prior felony was adequate to impeach and allowed the 2000 felony conviction for narcotics delivery to be used with the name of the crime charged.

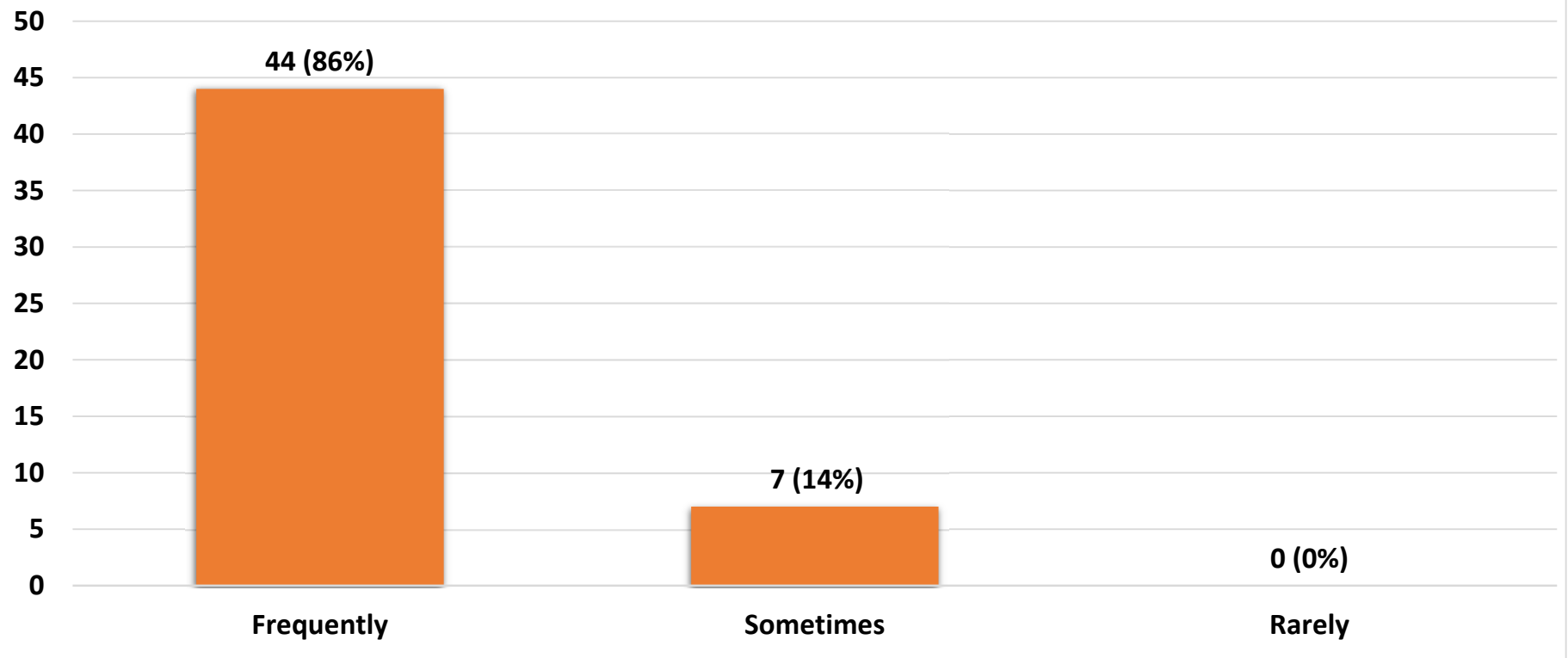


# TAB 5C

**Question 1:**  
**In your experience, does Rule 609 (a)(1)(B) impact your client's decision to take the stand to testify on their own behalf?**

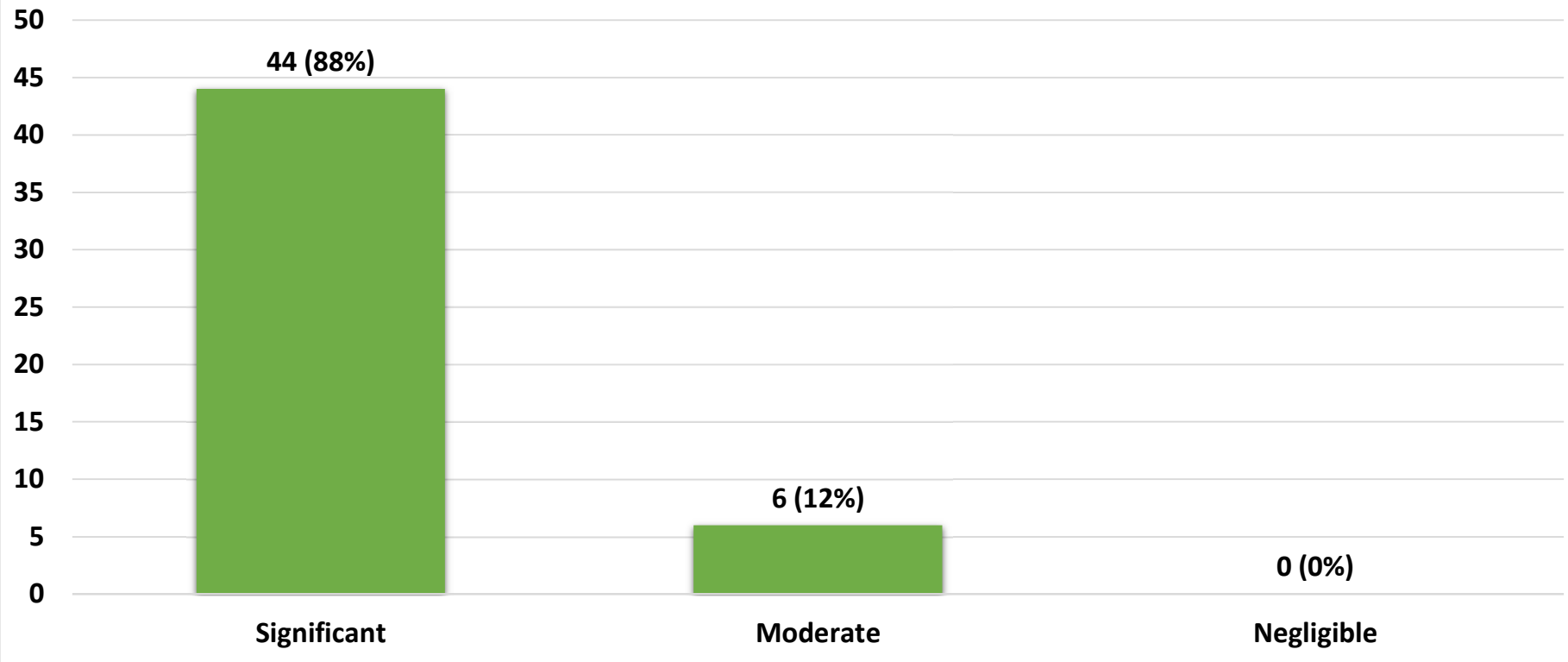


**Question 1a:**  
**If you responded yes to Question 1, please rate how frequently Rule 609(a)(1)(B) impacts your client's decision to take the stand to testify on their own behalf:**

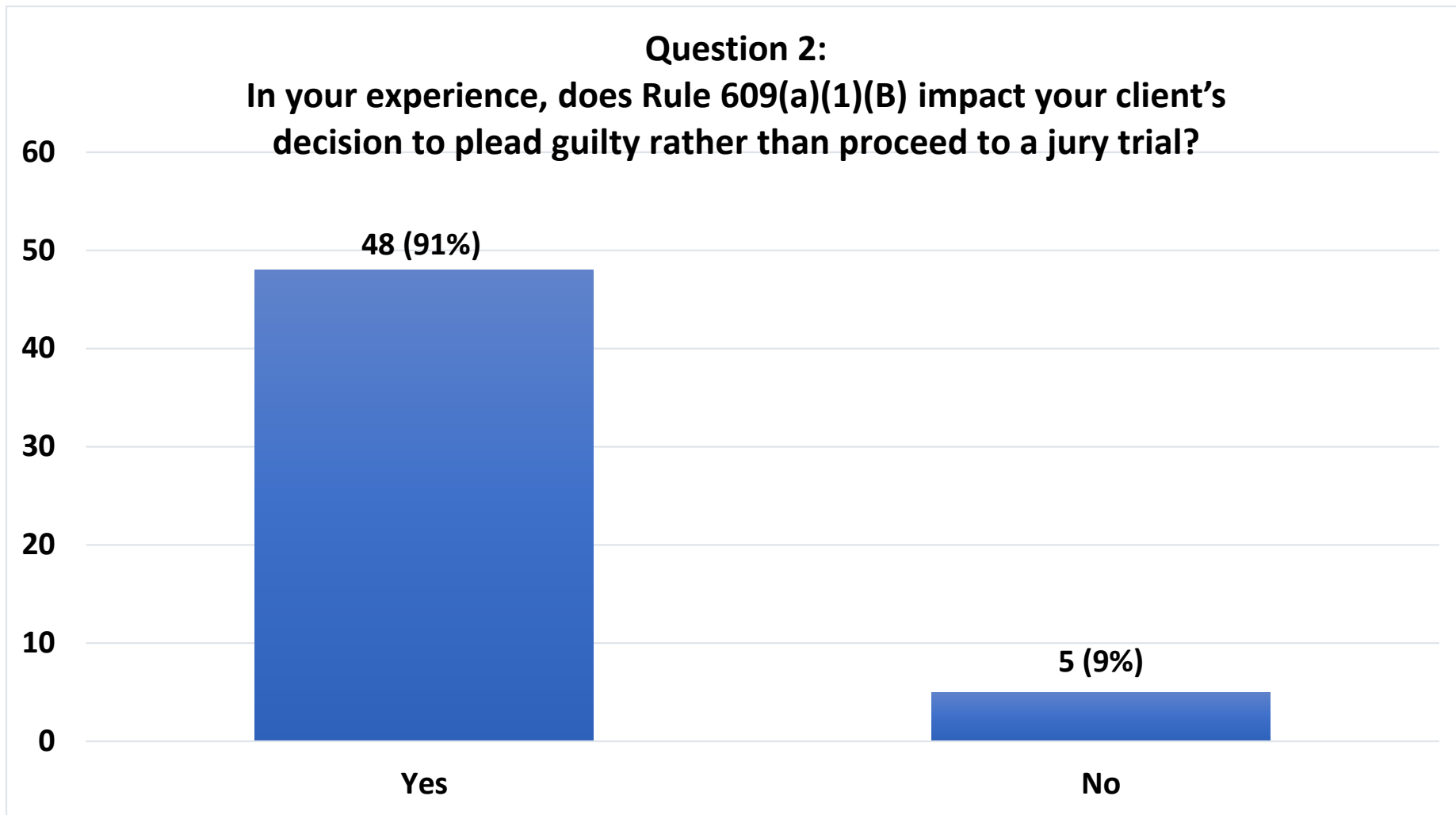


**Question 1b:**

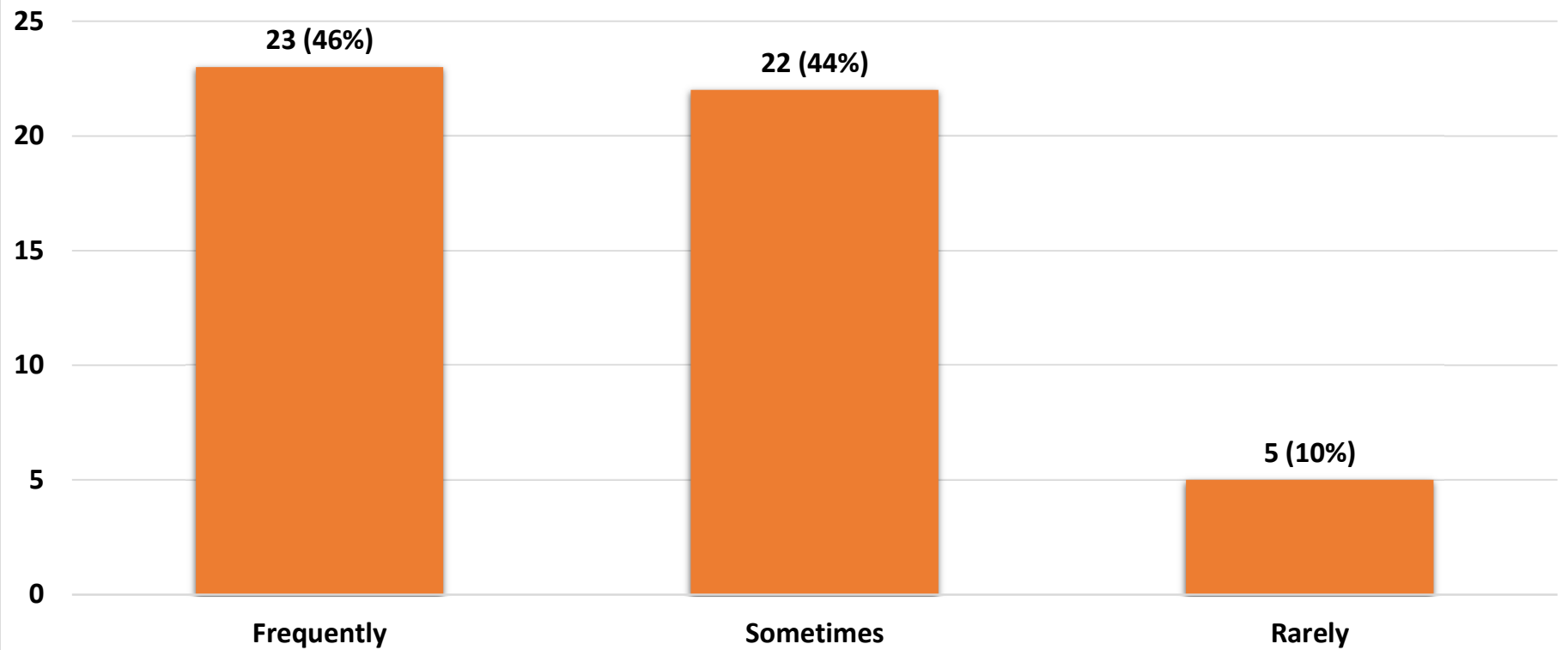
**If you responded yes to Question 1, please rate the impact Rule 609(a)(1)(B) has on your client's decision to take the stand to testify on their own behalf:**



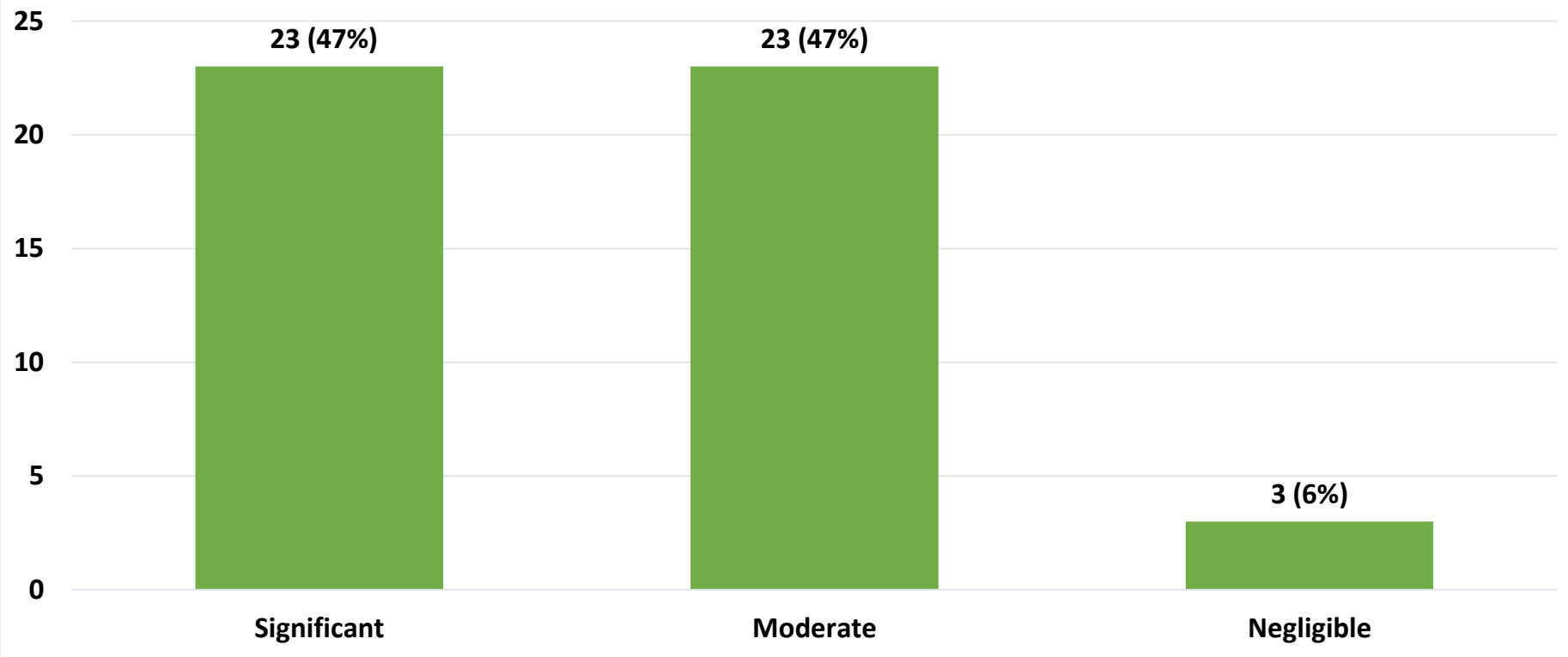
**Question 2:**  
**In your experience, does Rule 609(a)(1)(B) impact your client's decision to plead guilty rather than proceed to a jury trial?**



**Question 2a:**  
**If you responded yes to Question 2, please rate how frequently Rule 609(a)(1)(B) impacts your client's decision to plead guilty rather than proceed to a jury trial:**



**Question 2b:**  
**If you responded yes to Question 2, please rate the impact Rule 609(a)(1)(B)  
has on your client's decision to plead guilty rather than proceed to a jury trial:**



# TAB 5D



## Written Comments to Survey on Rule 609(a)(1) Sent to Public Defenders

February, 2024

Note: All of the following are quoted from the original.

### **Christine Freeman, Middle District of Alabama:**

The rule is particularly harmful in the 11<sup>th</sup> Circuit where the "similarity" test is very broadly applied and where if a jury's verdict indicated it rejected the defendant's testimony, that rejection is given the weight of substantive evidence.

### **Kevin Butler, Northern District of Alabama:**

The client is often the best witness for the defense. If the client takes the stand and is impeached with priors, the jury often the views the client as a bad person, even though the priors are not relevant to the issues at trial. Then the client's conviction is based upon jurors' dislike of the defendant rather than the actual facts presented during the trial. Compounding everything, if the client is convicted, the client is now looking at an enhanced sentence under the Sentencing Guidelines for obstruction of justice.

### **Jamie McGrady, District of Alaska:**

Generally priors of any significance almost always impact a decision to testify and keep the clients off the stand most of the time. Exceptions occur but are not the norm.

### **Jon Sands, District of Arizona:**

This has significant impact on violent crime cases, especially arising from Indian jurisdiction, where such issues as self-defense, diminished capacity, or arguing for a lesser included, require the defendant to testify.

### **Bruce D. Eddy, Western District of Arkansas:**

Rule 609(a)(1)(B) is the single most reason my clients decide not to proceed to trial.

### **Lisa Peters, Eastern District of Arkansas:**

I have practiced federal criminal defense nearly 30 years. This rule has greatly impacted clients' decisions to testify, or even take a potentially winnable matter to trial. In my humble view, justice is not served by the application of this rule, which is used even where the priors are not related to a credibility issue. It disproportionately impacts people of color, who historically have not received fair treatment in our system of justice, and therefore have more criminal history to read to a jury. In its current state, this rule effectively disallows a defendant a fair chance to fight the matter at hand.

**Jodi Linker, Northern District of California:**

A prior conviction and its effect on a client's ability to testify is always at the forefront of discussions of whether clients will plead or go to trial. It is often a conversation where we have to break the news that yes, the jury will likely hold it against them even though they have done their time and the present case has nothing to do with the past case. It is unduly burdensome.

**Heather E. Williams, Eastern District of California:**

In my last 14 jury trials, my clients had no prior convictions. 7 testified at their trial.

**Virginia Grady, Districts of Colorado and Wyoming:**

Our clients are consistently afraid that a prior conviction will cause jurors to draw a negative inference about their testimony and will cause the jury to think that they are a criminal, thus increasing the likelihood of a conviction. When the prior conviction is similar in kind to the charged offense, the fear is heightened and clients are even more hesitant to testify. The inference that underlies Rule 609 --- that a prior conviction equates to a lack of truthfulness --- is a faulty premise. Felonies are committed for a whole host of reasons, and very rarely does one of those reasons have anything to do with truthfulness. The stigma of a felony conviction is outdated and unfair.

**Millie Dunn, Northern District of Georgia:**

In our district, many judges allow the government to introduce convictions that are older than 10 years. The application of Rule 609 has a very real chilling effect on the client's exercise of both Fifth and Sixth Amendment rights.

**Salina Kanai, District of Hawaii:**

In a hate crime case I had recently, by client's testimony was effectively foreclosed because he had a prior assault conviction whose race was the same as the alleged victim in the case in which we went to trial. My client had assaults against other people whose race was different from the victim, so the prior that the government sought to admit had little, if anything to do with credibility. Nonetheless it played a large factor in my client's decision not to testify.

**Nicole Owens, District of Idaho:**

This is one of the major factors in our clients' decision to not go to trial and to not testify.

**John Murphy, Northern District of Illinois:**

Rule 609(a)(1)(B) plays a pivotal role in every defendant's decision to seek a trial. Regardless of the irrelevance a conviction may have to the issues at trial, every defense lawyer will advise their client that revealing the prior conviction to a jury may create a devastating and unfair impression that cannot be overcome. Thus, very valid challenges to a prosecution are left by the wayside for this reason alone.

**Thomas Patton, Central District of Illinois:**

It is nearly impossible for a client with a felony conviction to testify on his or her behalf. This is especially true of clients who are African American or Hispanic. Our jurors are almost exclusively white. It is very rare to have a minority in a trial venire. When faced with the choice of testifying and have the jury hear the client has a prior felony conviction or not testifying and keeping that information from the jury clients almost always choose not to testify. The clients just don't think the jury will be able to look past the prior conviction. In many cases, if the defendant cannot testify there is little reason to go to trial. We can't win without the client explaining what happened but the client can't testify because he is afraid the jury will convict him because he has a prior conviction. This is part of why we have so few trials.

**Kim Freter, Southern District of Illinois:**

Rule 609(a)(1) regularly affects our 922(g) and BOP contraband cases. Clients frequently prefer to enter into an Old Chief stipulation rather than testify and have the title of their conviction come into evidence. The titles frequently sound much worse than the pending case and there is no opportunity to explain the underlying facts. For example, Illinois has an Aggravated Unlawful Use of a Weapon statute that sounds violent and worse than another kind of unlawful use. However, Aggravated Use is essentially possessing a gun without a FOID card --- no violence is involved.

**David Beneman, District of Maine:**

I can't think of any case in which a client had a strong defense but pled rather than going to trial due to the Rule. I also can't recall a case where we really needed and wanted the client's testimony but they chose not to due to the Rule.

**Michael Carter, Eastern District of Michigan:**

The rule has a disparate impact on clients who come from marginalized and over-policed communities; it creates an improper barrier for clients who want to exercise their right to testify; and it permits jurors to hear about conduct that has nothing to do with the client's ability to be truthful. Overall, the rule works to severely limit a client's ability to put on a strong defense.

**Laine Cardarella, Western District of Missouri:**

Often a testifying client is the only witness with a criminal conviction. Our goal is to help the jury identify with our client --- a difficult feat. But add to that the possibility of the client being the only witness impeached with a conviction and it becomes nearly impossible. When that conviction has nothing to do with the client's credibility, it should be excluded. I believe the current rule limits the constitutional right to a fair trial.

**Rachel Julagay, District of Montana:**

Most clients facing federal indictment have prior criminal history and have encountered wholesale differential treatment from every corner as a result: probation, law enforcement, employers, housing opportunities, families and friends. They know and believe based on countless real world experiences, that people perceive them as not just less trustworthy, but less in every way

that matters for responsible adult behavior, simply by virtue of a prior conviction. Frankly, it is very difficult to convince them that there is anyone who would not find them inherently unreliable due to a felony conviction, an uphill battle that any career defense attorney knows too well from efforts to build trust with clients to forge a solid attorney-client relationship. Placing this to some degree well-rounded fear of being mistrusted in the context of most of our clients' total life experiences, which nearly always include extraordinary socioeconomic and other disadvantages, including discrimination, abuse, neglect and turmoil typifying a public defender client's life--it becomes easier to understand why clients hesitate to go to trial and take the witness stand, even when they have a compelling and contrary recollection of events. I would give one example, but this is a defining part of every conversation with every client about trial and testimony. Final note, my practice in "Indian country" teaches me Native clients are disproportionately affected by this and similar rules due to disproportionate prosecution for felonies in federal court.

**Rene Valladares, District of Nevada:**

The rule imposes a significant and frequent tax on criminal defendants' right to take the stand and go to trial. In my experience, defendants who are African American or Hispanic are disproportionately impacted by the rule.

**Marianne Mariano, Western District of New York:**

I think it is hard to measure the impact on the decision to plead guilty. I think it is rare when a trial defense rests on the shoulders of the defendant's testimony such that it would be the primary motivation to take a plea.

**Stephen Newman, Northern District of Ohio:**

The rule as written is problematic in several ways, chief among them being the likelihood of bias and impermissible use of prior convictions by the jury. Jurors may see a client's prior convictions and consequently determine the client to be a "bad person." And when presented with evidence of prior offenses, particularly those similar to the instant charged offense, there is a strong likelihood the jury will impermissibly use those prior convictions as propensity evidence. For example, it is tempting to think "once a drug dealer, always a drug dealer."

This rule – or the threat of it – comes into play in many cases, as our clients almost always have prior convictions that are likely admissible under this rule, and many of those convictions are similar to the instant offense. And our clients are usually the best and/or only witness available to recount the events surrounding those charges.

We regularly litigate the exclusion of prior offenses in liminal motions, arguing any probative value is substantially outweighed by a danger of unfair prejudice, but those motions are rarely granted. This therefore presents a Hobson's choice for the client: testify and open the door for the prior convictions to come in, or don't testify and close the door on the client's opportunity to explain what happened.

**Barry L. Derryberry, Northern District of Oklahoma:**

Where testimony is vital to the theory of defense, i.e., self-defense, the rule can impact the defendant's decision to testify.

**Jeff Byers, Western District of Oklahoma:**

Clients routinely consider (fear) the effect of cross-examination by a prosecutor who knows they have been in trouble. This is especially true in cases where the prior conduct is in some way shameful to them. Clients with ugly priors will often rule out testimony before even receiving advice from counsel. Any client who may need or want to testify is counseled about Rule 609's impact.

**Lisa Freedland, Western District of Pennsylvania:**

Once a client decides to proceed to trial, the Rule significantly impacts the decision whether to testify. This is especially true for Black clients in my district which has overwhelmingly white juries. Together with the fact that juries rarely include people who have been convicted of anything, this rule is particularly damaging and impactful.

**Bill Nettles, District of South Carolina:**

In my practice, the primary reasons the client pleads guilty are the weight of the evidence and the penalty the client faces if the client loses at trial. In gun cases where the client is subject to enhanced penalties under 924(e), the prospect of impeachment with a prior conviction is a huge impediment.

**Doris Randle-Holt, Western District of Tennessee:**

The client is significantly impacted by the federal rule, thinking the jury will be prejudiced against him because of his prior conviction.

**Henry Martin, Middle District of Tennessee:**

Very few prior convictions of our clients have anything to do with the client's credibility. Clients have a great fear that the jury will convict them merely because the client has one or more felony convictions.

[Included in the response was the following account from a public defender in the office]:

“I have a current client with a viable factual defense – but he has a sex charge on his record from 20 years ago. He also has mental health issues and is low functioning. The risk of having the jury know about his sex charge is a major factor in how he and I are assessing the benefits of a trial. He would have to testify. If it’s too risky for him to testify then we can’t have a trial. It’s also very hard for him to understand how this old conviction still has to come into evidence.”

**John D. McElroy, Eastern District of Texas:**

Often the client has a story to tell that cannot be presented by any means other than the client's testimony. When the client has any significant criminal history, most clients choose not to risk testifying at trial.

**Maureen Scott Franco, Western District of Texas:**

Why would a defendant go to trial and testify in their own defense if the government could use a prior, unrelated conviction against them to destroy their credibility? It's an extremely unfair rule, especially against people of color who are more likely to be prosecuted for criminal offenses as opposed to white offenders. No limiting instruction cures the admission of an unrelated prior conviction of a testifying defendant, and most judges allow it in --- even after the balancing test.

**Scott Wilson, District of Utah:**

The issue skews the entire consideration of how to approach trial and plea in so many cases. A defendant's testimony is one of the most significant variables in deciding whether a trial is a viable option in the first place, and prior felonies will almost always dictate the outcome of that issue.

**Lex Coleman, Southern District of West Virginia:**

If the prior conviction has nothing to do with the defendant's veracity, how can it ever be less prejudicial than probative? Yet it is ruled as being so, and that deters client testimony or my willingness to use it.

**Craig Albee, Eastern and Western Districts of Wisconsin:**

These are difficult questions to answer given how cases vary and how unique each decision to testify is. I can say that it has mattered and that it does affect strategy calls throughout the case. It can matter for the decision to plead but it's more with the respect to the decision to testify. It can matter more with a minority defendant and the typically all-white juries we have in our districts, where the prior conviction may be viewed as evidence of guilt.

# TAB 5E

Rene L. Valladares  
Federal Public Defender  
District of Nevada

Lori C. Teicher  
First Assistant

Christopher P. Frey  
Litigation Director



**FEDERAL PUBLIC  
DEFENDER**

— District of Nevada —

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March 8, 2024

Chief Judge Patrick Shiltz, Committee Chair  
Professor Dan Capra, Reporter  
Members of the Advisory Committee on Evidence Rules

RE: Amendments to Rule 609(a)(1)

Dear Chief Judge Shiltz, Professor Capra, and Committee Members:

I currently serve as the Litigation Director with the Federal Public Defender for the District of Nevada. In that role, I supervise litigation across our trial and habeas units (capital and non-capital) in federal and state court, while also maintaining my own trial caseload of death-eligible and complex criminal matters. I have been a public defender, in federal and state court, for a total of 15 years. I have tried more than 30 cases before a jury, including four homicides to verdict, and have litigated countless preliminary hearings, bench trials, and evidentiary hearings of nearly every variety.

Fear of being impeached by a prior felony conviction has unequivocally prevented my clients from testifying in their own defense. Even more troubling, fear of impeachment at trial has not only kept my clients off the stand, it has prevented them from going to trial.

The reason is simple. A felony conviction is widely perceived by lawyers and the criminally accused alike as ruinous to an accused's credibility and disqualifying for those seeking a fair chance at a merits-based evaluation by a jury. Consequently, in cases involving the risk of Rule 609(a)(1)(B) impeachment, clients who may have received an acquittal at trial instead plead guilty.

A survey of my own litigation experience underscores the dissuasive influence of Rule 609(a)(1)(B) on an accused's decision to testify. Trial attorneys can differ sharply in their opinions about whether a client should ever testify. The decision is often case- and client-specific, but I generally encourage it when strategically warranted, and have called many clients to the stand in high stakes cases. But there is a pattern in my own experience. Not one client I have represented with a prior felony conviction testified at his or her own trial. Only those with no exposure to prior felony impeachment have chosen to speak up in their own defense. Notably, several of the cases in which my client chose to take the stand resulted in an acquittal.



This pattern is not limited to my own practice. Rather, it is a widespread reality in the criminal legal system. Prosecutors understand the power of Rule 609(1)(a)(B) impeachment just as a counseled criminal defendant does. It is no coincidence that representing criminal defendants with prior felony convictions is common, but seeing them take the stand in their own defense despite their felony record is exceedingly rare.

Rule 609(1)(a)(B) chills criminal defendants throughout every stage of the process. If the prospect of impeachment by prior conviction does not encourage early resolution of a case at the plea bargaining phase, it ultimately enables a trial process in which the jury is deprived of hearing testimony from the accused. When the testimony of the accused is the only potentially compelling evidence available to compete with the prosecution's narrative of guilt, the jury's verdict necessarily rests on an incomplete presentation of the facts.

Rule 609(1)(a)(B) as drafted frustrates what should be the common interest of the accused and the community in safeguarding the integrity of case outcomes and enhancing the truth-seeking function of a jury trial, as well as the historical preference of having criminal cases decided on their full merits.

Please do not hesitate to contact me if I can share additional thoughts or further inform the Committee on any matter referenced in this letter.

Sincerely,



CHRISTOPHER P. FREY

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# TAB 6

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Memorandum To: Advisory Committee on Evidence Rules  
From: Liesa L. Richter, Academic Consultant  
Re: Evidence of an Alleged Victim's Prior False Accusations  
Date: March 25, 2024

Courts have struggled with whether and how to admit evidence of prior false accusations made by alleged victims in criminal cases, primarily in cases involving sexual assault. At the Fall 2023 meeting of the Evidence Advisory Committee, Professor Erin Murphy presented a proposal to amend the Federal Rules of Evidence to address the admissibility of prior false accusations evidence. The Committee unanimously decided to consider the possibility of amending the Federal Rules of Evidence to address such evidence.

In considering amendments to the Federal Rules, it is important to keep in mind that the vast majority of sexual assault cases, in which false accusation evidence is most commonly proffered, are prosecuted at the state level. According to the U.S. Sentencing Commission's Statistical Information Packet for Fiscal Year 2022, only 2.3 percent of federal sentencing nationwide were for sexual abuse-related offenses.<sup>1</sup> The federal prosecutions that are pursued primarily involve alleged assaults in Indian territory, with the occasional prosecution of a civilian for an assault on a military base.<sup>2</sup> It is also important to keep in mind that "empirical research has produced strong evidence that undermines the claim that sexual assault is a complaint especially likely to be fabricated."<sup>3</sup> Professor Murphy cites research suggesting that the percentage of sexual assault reports that are false is quite small, ranging somewhere between 2%-8% of total cases.<sup>4</sup>

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<sup>1</sup> United States Sentencing Commission, Statistical Information Packet for Fiscal Year 2022, Figure A.

<sup>2</sup> See, e.g., *United States v. Frederick*, 683 F.3d 913, 916 (8th Cir. 2012) (prosecution for sexual abuse of a minor on an Indian reservation); *United States v. A.S.*, 939 F.3d 1063, 1072 (10th Cir. 2019) (prosecution of juvenile civilian for sexual assault on a military base).

<sup>3</sup> Erin Murphy, *Impeaching with an Alleged Prior False Accusation*, \_\_ FORDHAM LAW REVIEW \_\_ (forthcoming 2024) (hereinafter *Impeaching with an Alleged Prior False Accusation*).

<sup>4</sup> *Id.* at n. 2 (citing David Lisak, Lori Gardinier, Sarah C. Nicksa & Ashley M. Cote, *False Allegations of Sexual Assault: An Analysis of Ten Years of Reported Cases*, 16(12) *Violence Against Women* 1318 (2010) (finding 5.9% of reports to be false) and Cassia Spohn & Katherin Tellis, *Policing and Prosecuting Sexual Assault* 102, 140, 164 (2014) (finding roughly 7.6% of initial reports false)). See also Christopher Bopst, *Rape Shield Laws and Prior False Accusations of Rape: The Need for Meaningful Legislative Reform*, 24 *J. Legis.* 125, 126 (1998) ("studies that have shown that the frequency of rape reports proven false, approximately two percent, mirrors the false reporting rates for

This memorandum proceeds in four parts. Part I describes how evidence of an alleged sexual assault victim’s prior false accusations may be evaluated under the existing Rules. Part II examines the amendment to the Rules proposed by Professor Murphy to admit prior false accusations evidence and potential amendment alternatives. Part III evaluates the merits and demerits of amending the Federal Rules to admit evidence of a victim’s prior false accusations. Part IV briefly concludes by recommending further study, including a fifty-state survey of rules regulating false accusation evidence, should the Committee wish to proceed with consideration of a new federal provision.

## **I. Existing Federal Standards Governing Admission of an Alleged Victim’s Prior False Accusations**

When a defendant seeks to offer extrinsic evidence of an alleged sexual assault victim’s prior false accusations, Federal Rules of Evidence 104, 404(b), 403, and 412 are implicated. Federal Rule of Evidence 608(b) governs a defendant’s right to impeach a testifying victim with a prior false accusation. Both Rules 403 and 412 are also implicated in evaluating the propriety of Rule 608(b) impeachment. Finally, in a criminal case, the defendant may assert a constitutional right to admit evidence of an alleged victim’s prior false accusation, or to impeach a testifying victim with a prior false accusation.

### **A. Rule 404(b): Extrinsic Evidence of an Alleged Victim’s Prior False Accusations**

When a defendant offers evidence that an alleged victim has previously falsely accused someone of a crime, such as testimony of a witness describing the victim’s past conduct or documentation of a prior false accusation, such evidence is currently governed by Federal Rule of Evidence 404(b). Rule 404(b) regulates evidence of a person’s “other crimes, wrongs, or acts.”<sup>5</sup> A victim’s accusation made in a prior case or circumstance certainly counts as an “other act” and, if it was knowingly false, qualifies as a “crime” and a “wrong” as well.

Rule 404(b)(1) provides that a person’s other crime, wrong, or act may not be admitted to show her character to suggest her conduct on a particular occasion.<sup>6</sup> Rule 404(b)(1) thus prohibits evidence of a person’s prior acts when offered to suggest the person’s propensity to behave in certain ways to show that the person likely behaved consistently on a disputed occasion. Evidence that an alleged victim previously accused someone falsely of an offense against her certainly relies on a propensity inference when offered to show that she is falsely accusing a different defendant in the instant case. The prior false accusation suggests that this alleged victim is the sort of person

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other crimes.”) (proposing a new Rule of Evidence to allow extrinsic evidence of prior false accusations of sexual assault upon a requisite showing of falsity).

<sup>5</sup> Fed. R. Evid. 404(b).

<sup>6</sup> Fed. R. Evid. 404(b)(1).

who would falsely accuse a person in an effort to show that she is acting in accordance with her tendencies and is falsely accusing a new defendant in the instant action. If an alleged victim's prior false accusation is viewed as showing the victim's propensity for false accusation to suggest her false accusation of the current defendant, evidence of that prior false accusation should be excluded under Rule 404(b)(1). Professor Murphy has described false accusation evidence as demonstrating a "propensity or character to falsely accuse."<sup>7</sup>

There are very few federal cases analyzing the admissibility of extrinsic evidence of a victim's prior false accusations under Federal Rule of Evidence 404(b). The Ninth Circuit recognized the relevance of Rule 404(b)(1) to prior false accusation evidence in affirming the denial of a habeas petition in *Hughes v. Raines*.<sup>8</sup> In *Hughes*, the Ninth Circuit affirmed the district court's denial of a habeas petition alleging a violation of the defendant's confrontation rights due to the trial court's refusal to allow cross-examination of the victim regarding a prior accusation of rape. In rejecting the confrontation clause challenge, the Ninth Circuit explained that:

Even if the jury reasonably could conclude that the prior charge was false, the relevance of that conclusion to this case is slight. The inference the jury would be asked to draw is that because the complaining witness made a false accusation of attempted rape on a prior occasion, her accusation in this case was false. Our rules of evidence reflect a general reluctance to draw an inference that because a person may have acted wrongfully on one occasion, he or she also acted wrongfully on the occasion at issue. See Fed.R.Evid. 404(b).<sup>9</sup>

But evidence of prior false accusations may be more specific than the generic character evidence typically excluded by Rule 404(b)(1). As Professor Murphy notes, "[t]here is simply a sharp conceptual and practical distinction between using a random, generic act of dishonesty to impugn a person's honesty under oath at trial, and using evidence of a prior false accusation to impugn the credibility of the complainant's present accusation."<sup>10</sup> Prior false accusation evidence is far more particularized than evidence showing that an alleged victim has a tendency toward dishonesty generally, such as evidence that she previously lied on an employment application or in some other lesser or distinct context.<sup>11</sup> Prior false accusation evidence may reveal that the alleged victim has accused another person of sexual assault in circumstances very similar to those present in the instant case and that the victim's prior similar accusation was false. Federal Rule of Evidence 404(b)(2) allows a person's other crimes, wrongs, or acts to be admitted for a permitted

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<sup>7</sup> *Impeaching with an Alleged Prior False Accusation*, *supra* n. 3 at 10.

<sup>8</sup> 641 F.2d 790, 793 (9th Cir. 1981).

<sup>9</sup> *Id.*

<sup>10</sup> *Impeaching with an Alleged Prior False Accusation*, *supra* n. 3 at 9.

<sup>11</sup> *See, e.g., United States v. Howard*, 774 F.2d 838, 844-45 (7th Cir. 1985) (witness lying on employment application).

purpose, such as showing her “motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake, or lack of accident.”<sup>12</sup>

An alleged victim’s prior false accusation cannot be seen as part of a common plan or scheme in the typical case in which the victim previously accused one person of wrongdoing and is now accusing a separate defendant of wrongdoing arising out of a distinct interaction. It would often be inappropriate to characterize two separate events as comprising part of a single plan by the victim. Similarly, prior false accusation evidence may be insufficiently distinctive to show the victim’s “modus operandi” and the question of the *victim’s* “identity” typically revealed by such modus operandi evidence is unlikely to be at issue. Nor would prior accusation evidence appear relevant to show absence of mistake or lack of accident. Sadly, particularly for vulnerable populations, numerous sexual assault accusations by a single victim would not implicate the doctrine of objective chances. Nor would a prior false accusation demonstrate the alleged victim’s knowledge in the typical case.

But one could argue that some prior false accusation evidence can demonstrate the alleged victim’s intent or motive in accusing the defendant in a manner similar to the intent and motive evidence routinely admitted against criminal defendants under Rule 404(b)(2). For example, when a defendant in a criminal drug prosecution argues that he was not planning to distribute drugs on a charged occasion in which he is apprehended in proximity to drugs or drug distribution, prosecutors often admit evidence of the defendant’s prior intentional drug distribution or even possession to suggest his intent on the occasion in question and his motivation for being in close proximity to drug dealing.<sup>13</sup> When an alleged victim denies making a false accusation in the instant case and insists that an encounter with the defendant involved a sexual assault, for example, the accused might try to show the victim’s previous false accusation in a very similar circumstance to show her intent and motive for making the accusation in the current situation.

Professor Murphy suggests the following scenario:

A defendant is charged with sexually assaulting a woman at an in-patient drug treatment program. The defendant uncovers evidence that the woman previously accused employees of sexual assault at two different programs, allegedly in order to get out of the program.<sup>14</sup>

On these facts, a defendant could argue that the two prior false accusations reveal the alleged victim’s motivation and intent in falsely accusing him. Indeed, such prior false accusations suggest something of a *modus operandi* of the victim in extracting herself from an in-patient setting. Rather than simply suggesting the victim’s general propensities to fabricate or falsely accuse, past false accusations made in unique and similar contexts may reveal the victim’s motivation in accusing the instant defendant.

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<sup>12</sup> Fed. R. Evid. 404(b)(2).

<sup>13</sup> See, e.g., *United States v. Smith*, 741 F.3d 1211 (11th Cir. 2013) (affirming admission of prior possession offenses to show defendant’s intent to distribute drugs).

<sup>14</sup> *Impeaching with an Alleged Prior False Accusation*, *supra* n. 3 at 4.

A federal district court accepted a similar argument in *United States v. Stamper*.<sup>15</sup> In that case, a teenage girl was sent to live with her mother and her mother's live-in boyfriend after her parents divorced. After disciplinary difficulties arose with her mother, the teenage girl accused the live-in boyfriend, as well as two other family members frequently in her mother's home of sexual assault. As a result of these allegations, the teenage girl was sent to live with her father. Shortly thereafter, the girl wrote a letter to a friend in which she stated that her allegations of sexual assault were "not true." The investigations into those allegations were then halted. Disciplinary difficulties soon arose between the teenage girl and her father. Shortly thereafter, the girl accused Stamper, a co-worker and friend of her father's who was frequently at her father's home of sexual contact. Prior to trial, the defendant Stamper sought permission to present extrinsic evidence of the prior false accusations of sexual assault. In finding the evidence admissible, the district court explained the proper purpose for admission of the past accusations:

Defendant, a law enforcement dispatcher before these charges were brought, seeks to offer exculpatory evidence that the complainant's charges against him were motivated by the bias and ulterior motive of a willful adolescent from a broken home bent on manipulating those who had custody of her and control of her activities. Defendant's proffered evidence goes beyond the general provisions of Rule 404(b), for the Defendant does not wish to show that the prior false allegations of sexual abuse, under similar circumstances, establish a mere propensity to fabricate. Rather, Defendant seeks to put forth these allegations as proof of a contrived ulterior motive and plan. In that sense the Court should give, at least if requested by the Government, an instruction that the prior falsehoods by the alleged victim, if so found by the jury, would not in themselves prove falsity in the instant case, but could be considered on the question of motive or plan, if any, behind the accusations in the case at hand. Defendant is entitled to offer the evidence necessary to prove his theory of the case by showing that complainant's charges against him did not evince a single isolated instance of manipulative behavior, but rather were part of an ongoing scheme or, at least, a scheme revealed by the like motives and *modus operandi* of schemes past.<sup>16</sup>

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<sup>15</sup> *United States v. Stamper*, 766 F. Supp. 1396, 1406 (W.D.N.C. 1991), *aff'd sub nom.* In re One Female Juv. Victim, 959 F.2d 231 (4th Cir. 1992).

<sup>16</sup> *Id.* ("The admissibility of the proffered evidence demonstrating the defense theory of complainant's scheme of fabricating sexual abuse allegations is expressly contemplated by the Rule 404(b) list of material issues, which is itself not "exhaustive, but merely illustrative."); see also *Sec'y, Fla. Dep't of Corr. v. Baker*, 406 F. App'x 416, 424-25 (11th Cir. 2010) (affirming grant of habeas on constitutional grounds where state court excluded evidence that victim had repeatedly falsely accused family members of sexual assault: evidence that victim had habitually lied about sexual assaults by family members "not only spoke to her general character for truthfulness, but particularly attacked her truthfulness and motivation for testifying as they related directly to her allegation against Baker."). State courts have accepted similar arguments. See, e.g., *Phillips v. State*, 545 So. 2d 221, 223 (Ala. Crim. App. 1989) (evidence of prior false allegations was admissible as exposing victim's corrupt state of mind); *People v. Hurlburt*, 333 P.2d 82, 86-87 (Cal. Dist. Ct. App. 1958) (false rape allegations are admissible as showing the complainant's animosity towards the defendant); *People v. McClure*, 356 N.E.2d 899, 901 (Ill. App. Ct. 1976) (since false rape allegations concerned motivation in bringing current charge, evidence of these false charges should have been admitted); *State v. Anderson*, 686 P.2d 193, 198-201 (Mont. 1984) (evidence of prior false rape accusations should be admitted as probative of the state of mind of the complainant). Of course, Rule 403 still applies in a 404(b)(2) context and a trial court should weigh the probative value of the prior act in showing motive or intent against the jury's potential pure propensity use.

Even in the rare circumstance in which an alleged victim’s prior false accusation serves a permitted purpose under Rule 404(b)(2), there may be serious questions as to whether prior accusations made by the victim were, in fact, false. A victim may deny having made prior false accusations and may insist that any prior accusations were also true and accurate. According to the Supreme Court’s decision in *Huddleston v. United States*, the question of whether a person committed a prior crime, wrong or act for purposes of Rule 404(b)(2) is one of conditional relevance that is governed by Rule 104(b).<sup>17</sup> A person’s prior act is only relevant in resolving disputed issues in the current case if, in fact, the person engaged in the prior conduct. In *Huddleston*, the Supreme Court held that the prosecution must offer sufficient evidence from which a reasonable jury could find that the defendant “more likely than not” committed the prior act in order for Rule 404(b)(2) evidence to be admitted against him.<sup>18</sup> Thus, in a criminal case in which the prosecution offers evidence of the defendant’s prior acts to show intent or knowledge and the defendant denies committing the prior acts, the prior acts evidence may be admitted so long as the prosecution has sufficient evidence to support a jury finding by a preponderance that the defendant committed the prior act.

If an alleged victim’s prior false accusations are admitted through Rule 404(b)(2), the *Huddleston* standard would also appear to apply. If the victim denies having made a prior false accusation, the question of whether she did is one of conditional relevance – her prior false accusation is only helpful in evaluating her accusation in the instant case if, in fact, she made the prior false accusation. According to *Huddleston*, the defendant would need evidence sufficient for a reasonable jury to find that the victim made a prior accusation and that she knew it was false by a preponderance of the evidence.<sup>19</sup> Testimony from a person previously accused by the alleged victim denying any wrongdoing and claiming a false accusation could be sufficient to satisfy the *Huddleston* standard. If believed by the jury, such testimony could be sufficient to show a prior false accusation by a preponderance.

In sum, evidence of an alleged victim’s prior false accusation should be excluded under Rule 404(b)(1) when offered to show that the victim is making a false accusation in the instant case unless the trial court finds that the prior false accusation is offered for a purpose permitted by Rule 404(b)(2). If the court finds a proper Rule 404(b)(2) purpose, the defendant will need evidence at least sufficient to show by a preponderance that the alleged victim made a prior false allegation.

## **B. Impeachment of a Testifying Victim with a Prior False Accusation**

Even when extrinsic evidence of an alleged victim’s prior false accusation is not admissible through Rule 404(b)(2), a victim may be impeached with inquiries about her prior false accusations on cross-examination if she takes the stand against the defendant. Federal Rule of Evidence

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<sup>17</sup> *Huddleston v. United States*, 485 U.S. 681, 685 (1988).

<sup>18</sup> *Id.*

<sup>19</sup> See Edward J. Imwinkelried, *Should Rape Shield Laws Bar Proof That the Alleged Victim Has Made Similar, False Rape Accusations in the Past?: Fair Symmetry with the Rape Sword Laws*, 47 U. Pac. L. Rev 709 (2016) (arguing that *Huddleston* standard should apply to false accusation evidence).



404(a)(3) permits character evidence regarding testifying witnesses as provided by Rules 607, 608, and 609.<sup>20</sup> In a circumstance in which a victim does not testify at trial, however, impeachment with prior false accusations is unavailable.<sup>21</sup>

In the unlikely event that an alleged victim had previously been convicted of falsely accusing someone of a crime, her prior conviction would be automatically admissible to impeach her trial testimony under Rule 609(a)(2). Rule 609(a)(2) requires the trial court to permit impeachment of any witness with a prior conviction “if the court can readily determine that establishing the elements of the crime required proving – or the witness admitting – a dishonest act or false statement.”<sup>22</sup> A conviction of an alleged victim for falsely reporting a crime or falsely accusing a person of a crime would require proof of her false statement. Thus, if an alleged victim testifies against a defendant and has a prior conviction for false reporting, that conviction would be admissible to impeach her trial testimony.

In the typical scenario in which an alleged victim has never been *convicted* of false reporting, she may be impeached with prior false accusations through Rule 608(b) if she testifies against the defendant. Under Rule 608(b), the defendant may inquire about “specific instances of a witness’s conduct in order to attack ... the witness’s character for truthfulness.”<sup>23</sup> A testifying victim’s prior false accusations arising out of a separate incident could certainly count as prior acts of “dishonesty” about which a witness could be cross-examined. Still, a trial judge has discretion to prohibit questioning about acts of dishonesty under Rule 403 if the judge determines that the probative value of the act to impeach is substantially outweighed by unfair prejudice.<sup>24</sup> If a testifying victim’s prior false accusation occurred many years earlier and in a highly distinct context, therefore, a trial judge could foreclose cross-examination about it even if the false accusation qualifies as a prior act of “dishonesty” for purposes of Rule 608(b).<sup>25</sup>

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<sup>20</sup> Fed. R. Evid. 404(a)(3).

<sup>21</sup> See Fed. R. Evid. 608 (applying only to a “witness’s” character for untruthfulness).

<sup>22</sup> Fed. R. Evid. 609(a)(2).

<sup>23</sup> Fed. R. Evid. 608(b).

<sup>24</sup> See *United States v. Frederick*, 683 F.3d 913, 919 (8th Cir. 2012) (“The district court under Rule 608(b) may determine if evidence is probative of truthfulness and under Rule 403 may exclude evidence, even though probative, if the probative value is outweighed by the prejudicial effect.”).

<sup>25</sup> See *United States v. Meschino*, 643 F.3d 1025, 1029 (7th Cir. 2011) (district court properly denied defendant cross of victim regarding alleged prior false accusation where there was insufficient indication that it was false and “it was reasonable for the district court to conclude that even if there was some reason to doubt Victim A’s accusation against her stepbrother, this line of inquiry had little bearing on her testimony against Meschino because it was so dissimilar, concerned a different abuser, very different circumstances, and a singular event that took place six years after Meschino’s decade-long abuse had stopped. This was a reasonable exercise of discretion.”).

In order to inquire about a witness’s prior acts of dishonesty under Rule 608(b), a cross-examiner needs only a “good faith” basis for the inquiry.<sup>26</sup> Applying that standard requirement to an alleged victim’s prior false accusations, a defendant would need only a “good faith basis” for believing that the victim had levied a prior accusation and that it was false before inquiring about it on cross-examination. Evidence that a prior accusation was not timely reported or was ultimately not prosecuted would not seem sufficient to provide even a good faith basis for an inference of *falsity* in this context. Many sexual assaults are not timely reported and, those that are, may go unprosecuted for reasons unrelated to the falsity of the accusation, including a lack of sufficient evidence.<sup>27</sup> Information suggesting that the alleged victim recanted a prior accusation would seem to provide a “good faith basis” for inferring that the original accusation was untrue, however.<sup>28</sup> Importantly, extrinsic evidence of prior acts of dishonesty is not admissible to impeach the character of a testifying witness pursuant to Rule 608(b).<sup>29</sup> Therefore, even if the trial court permits a defendant to inquire about prior false accusations during cross-examination of the testifying victim, the defendant could not offer evidence to prove the prior false accusation if the victim denies making it or denies that it was false when asked about it on cross-examination.<sup>30</sup>

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<sup>26</sup> See *Michelson v. United States*, 335 U.S. 469, 481 (1948) (foreclosing “groundless” questions).

<sup>27</sup> *Impeaching with an Alleged Prior False Accusation*, *supra* n. 3 at 16-17.

<sup>28</sup> See *United States v. Stamper*, 766 F. Supp. 1396, 1406 (W.D.N.C. 1991), *aff’d sub nom.* In re One Female Juv. Victim, 959 F.2d 231 (4th Cir. 1992) (victim wrote to friend that prior accusation was “not true.”).

<sup>29</sup> Fed. R. Evid. 608(b) (“Except for a criminal conviction under Rule 609, extrinsic evidence is not admissible to prove specific instances of a witness’s conduct in order to attack or support the witness’s character for truthfulness.”).

<sup>30</sup> See *United States v. A.S.*, 939 F.3d 1063, 1072 (10th Cir. 2019) (“[a]n attorney cross-examining” the witness under Rule 608(b) can “only ask about the alleged dishonest act” and then is “‘stuck with’ his answer, even a denial.”); *Ellsworth v. Warden*, 333 F.3d 1, 8 (1st Cir.2003) (en banc) (“[t]he theory, simple enough, is that evidence about lies not directly relevant to the episode at hand could carry courts into an endless parade of distracting, time-consuming inquiries.”). Some state courts have made an “exception” to the limitation on extrinsic evidence with respect to evidence of a victim’s prior false accusation of sexual assault and have allowed the admission of extrinsic evidence to refute the victim’s denial of the prior false accusation during cross-examination. See, e.g. *Miller v. State*, 779 P.2d 87 (Nev. 1989); *People v. Mikula*, 269 N.W.2d 195 (Mich. Ct. App. 1978). These state decisions fail to explain their authority to deviate from the statutory limitation on extrinsic evidence contained in their counterparts to Federal Rule 608(b). Christopher Bopst, *Rape Shield Laws and Prior False Accusations of Rape: The Need for Meaningful Legislative Reform*, 24 J. Legis. 125, 139 (1998) (noting that these state courts have “failed to explain [their] logic for circumventing the statutory prohibition against extrinsic evidence.”).

In the extremely unlikely event that a testifying victim proclaimed on direct examination that she had never falsely accused anybody, a defendant could admit extrinsic evidence of the victim’s prior false accusation to contradict her. See *United States v. Velarde*, 485 F.3d 553, 562–63 (10th Cir. 2007) (“In *United States v. Magallanez*, 408 F.3d 672 (10th Cir.2005), on which Mr. Velarde relies, we held that the government was properly allowed to call a rebuttal witness to contradict a false statement made by a witness on direct examination. Accordingly, if, on direct examination, L.V. were to testify that she had never made a false accusation of sexual abuse, *Magallanez* would support the introduction of the evidence (assuming it exists) regarding her false accusations against her teacher and vice principal. If, however, the issue did not arise on direct, the defense would be permitted to cross-examine her regarding the supposed false accusations at school, but *Magallanez* would not permit Mr. Velarde to introduce extrinsic evidence regarding such accusations.”).

Therefore, if an alleged victim testifies against a defendant, Rule 608(b) permits a defendant to inquire about her non-conviction prior false accusations on cross-examination so long as the prior false accusations survive Rule 403 balancing and so long as the defendant has a “good faith basis” for such questions. But Rule 608(b) will not permit the defendant to offer extrinsic evidence to prove the victim’s prior false accusations. And Rule 608(b) authorizes no inquiry into a victim’s prior false accusations if the victim does not testify.

### **C. Rule 412: Application of the Rape Shield Rule**

If a court finds that extrinsic evidence of a victim’s prior false accusation is admissible under Rule 404(b)(2) or that a defendant has the requisite good faith basis for inquiring about a victim’s prior false accusation on cross-examination, the court must also consider the application of Rule 412 in a sexual assault case.<sup>31</sup> It is important to note that Rule 412 does not authorize the admission of any evidence. It is a rule of exclusion that prohibits evidence of an alleged victim’s sexual predisposition or prior sexual conduct in any criminal or civil case involving alleged sexual misconduct, subject to certain exceptions.<sup>32</sup> Congress directly enacted Rule 412, known as the “rape-shield statute” in the late 1970’s shortly after the enactment of the Federal Rules of Evidence.<sup>33</sup> Rule 412 was amended through the rulemaking process in 1995 to clarify the provision and to “expand the protection afforded to victims of sexual misconduct.”<sup>34</sup> The Advisory Committee’s note to the 1995 amendments to Rule 412 explained their purpose:

The rule aims to safeguard the alleged victim against the invasion of privacy, potential embarrassment and sexual stereotyping that is associated with public disclosure of intimate sexual details and the infusion of sexual innuendo into the fact finding process. By affording victims protection in most instances, the rule also encourages victims of sexual misconduct to institute and to participate in legal proceedings against alleged offenders.<sup>35</sup>

To the extent that prior false accusation evidence or inquiries suggest prior sexual conduct by a victim, they could be regulated by Rule 412.<sup>36</sup> On the other hand, to the extent that prior false accusations evidence is offered to show prior *lying* behavior by an alleged victim, it would not

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<sup>31</sup> Fed. R. Evid. 412 (regulating evidence of a victim’s sexual behavior or predisposition in sex-offense cases).

<sup>32</sup> Fed. R. Evid. 412(a).

<sup>33</sup> Edward J. Imwinkelried, *The Golden Anniversary of the “Preliminary Study of the Advisability and Feasibility of Developing Uniform Rules of Evidence for the Federal Courts”: Mission Accomplished?*, 57 Wayne L. Rev. 1367 (2011) (describing the original adoption of Rule 412 as “direct Congressional intervention on a ‘politically-charged evidentiary issue.’”).

<sup>34</sup> Advisory Committee’s note to 1995 amendment to Fed. R. Evid. 412.

<sup>35</sup> *Id.*

<sup>36</sup> *Impeaching with an Alleged Prior False Accusation*, *supra* n. 3 at 5 (“when sexual activity is conceded, and the alleged “falsehood” is solely as to whether the activity was consensual, then arguably Rule 412 properly governs an alleged PFA.”).

appear to be covered by the Rule 412 exclusionary rule.<sup>37</sup> The Advisory Committee note to Rule 412 contemplated this possibility, explaining that “[e]vidence offered to prove allegedly false prior claims by the victim is not barred by Rule 412. However, this evidence is subject to the requirements of Rule 404.”<sup>38</sup> In keeping with this Committee note, most courts have found that an alleged victim’s prior false accusations of sexual assault are not excluded by Rule 412 because the prior acts are offered to show the victim’s past lying behavior rather than her past sexual conduct.<sup>39</sup>

Excluding a victim’s prior accusations from Rule 412 protection thus requires a finding that those accusations were knowingly false.<sup>40</sup> Although Rule 412(c) prescribes a procedure to determine admissibility of evidence that includes pre-trial notice, motion, and hearing, it does not address findings of falsity or set a standard or proof by which a victim’s prior acts must be established.<sup>41</sup> The standard of proof applied to a finding of falsity will have a direct impact on the level of protection afforded by Rule 412. As noted above, to admit extrinsic evidence of a prior false accusation under Rule 404(b)(2), courts would ordinarily apply the traditional Rule 104(b) *Huddleston* standard of proof.<sup>42</sup> To allow cross-examination of a testifying victim pursuant to

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<sup>37</sup> See, e.g., *United States v. Frederick*, 683 F.3d 913, 917 (8th Cir. 2012) (observing “that ‘there is a question whether Rule 412 reaches the use of a prior false accusation of rape for impeachment purposes’ and that it ha[s] been suggested by legal commentators that such evidence [i]s ‘more properly analyzed under Rule 608(b)’”); *United States v. Stamper*, 766 F. Supp. 1396, 1399 (W.D.N.C. 1991), *aff’d sub nom.* *In re One Female Juv. Victim*, 959 F.2d 231 (4th Cir. 1992) (“A threshold question might be whether demonstrably false past allegations of rape or sexual abuse lodged by the alleged victim are evidence of “past sexual behavior.” Several courts have excluded such evidence from the definition of “past sexual behavior.””).

<sup>38</sup> Advisory Committee’s note to Fed. R. Evid. 412.

<sup>39</sup> Christopher Bopst, *Rape Shield Laws and Prior False Accusations of Rape: The Need for Meaningful Legislative Reform*, 24 J. Legis. 125, 136 (1998) (“Trial judges and appellate courts generally agree that prior false rape allegations do not constitute sexual behavior within the meaning of rape shield statutes.”).

<sup>40</sup> See, e.g., *United States v. Crow Eagle*, 705 F.3d 325, 329 (8th Cir. 2013)(the district court did not abuse its discretion or violate Crow Eagle’s Sixth Amendment rights by excluding witnesses’ prior sexual-assault allegations where the defense produced no evidence of the falsity of the prior allegations except the length of time before reporting and the failure of prosecution); *United States v. Barrett*, 2023 WL 7528606, at \*4 (E.D. Cal. Nov. 13, 2023)(rejecting use of prior false accusations to show victim pattern of engaging in consensual sex while drunk and later claiming it to be assault due to lack of evidence that prior accusations were false: “The fact that a sexual assault victim has previously accused others of assault is only relevant insofar as “it [can] be shown convincingly that the other charge was false.” Even if a defendant can show that a prior assault allegation against a third party was false, the admissibility of that accusation depends on its similarity to the facts of the charged assault.”) (citing Fed. R. Evid. 404(b)); *United States v. Tail*, No. CR.04-50026-01-KES, 2005 WL 2114224, at \*2 (D.S.D. Aug. 31, 2005), *aff’d*, 459 F.3d 854 (8th Cir. 2006) (“If Tail fails to establish falsity, the evidence is governed by Fed. R. Evid 412, not Fed.R.Evid. 608(b), because it is evidence of sexual behavior rather than a prior false allegation.”).

<sup>41</sup> Fed. R. Evid. 412(c).

<sup>42</sup> See *United States v. Stamper*, 766 F. Supp. 1396, 1406 (W.D.N.C. 1991), *aff’d sub nom.* *In re One Female Juv. Victim*, 959 F.2d 231 (4th Cir. 1992) (treating question of falsity as a 104(b) question ultimately to be resolved by the jury: “There is sufficient relevant evidence, going to the issues of the falsity of the three prior allegations of sexual abuse and the bias or motive of the complainant in making such allegations, to warrant the submission of such evidence

Rule 608(b), courts traditionally require only a “good faith basis” for a witness’s prior dishonest acts. Applying these standards of proof to a finding of falsity with respect to prior accusations of sexual assault could provide insufficient protection for victims, however, and a higher standard of proof may be necessary to place evidence of a victim’s past conduct outside of Rule 412 protections.<sup>43</sup> Under the *Huddleston* standard, for example, a defendant might simply call a previously accused person to testify that he had consensual sex with the victim and that she falsely accused him of rape thereafter as prima facie proof of falsity. This standard could thus open the door to the liberal admission of evidence of a victim’s prior sexual encounters and undermine Rule 412 protections. To offer more protection to alleged victims of sexual assault, a court might evaluate evidence of prior falsity under Rule 104(a) and allow such prior accusation evidence only if the *court* is satisfied by a preponderance that the prior accusation was indeed false.<sup>44</sup> Upon an appropriate showing of falsity to remove the victim’s prior acts from Rule 412 protection, a court could permit a defendant to offer evidence of a victim’s prior false accusations pursuant to Rule 404(b)(2) or to cross-examine a testifying victim about prior false accusations pursuant to Rule 608(b).

#### **D. A Criminal Defendant’s Constitutional Right to Present Evidence of or to Cross-Examine a Victim about Prior False Accusations**

Of course, a criminal defendant possesses constitutional rights to present evidence critical to his defense and to confront the witnesses against him.<sup>45</sup> In rare circumstances, the Supreme Court has found the right to present a complete defense violated by the exclusion of defense evidence.<sup>46</sup>

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to the jury. Thus, it becomes the jury’s province in this case to determine the veracity of these previous allegations and the weight such allegations may be accorded in their final determination of Defendant’s guilt or innocence.”).

<sup>43</sup> *Impeaching with an Alleged Prior False Accusation*, *supra* n. 3 at 17 (arguing for a higher standard of proof to prevent undermining rape shield protection).

<sup>44</sup> *See, e.g.*, *United States v. Erikson*, 76 M.J. 231, 236 (C.A.A.F. 2017) (Judge decides falsity per 104(a) “At trial, Appellant was required to establish the falsity of SPC BG’s previous sexual assault accusation in order for it to be admissible under an M.R.E. 412 exception *or* for it to be admissible under any other rationale such as evidence of a modus operandi, motive, or character evidence for lack of truthfulness.”). There are very few federal sexual assault prosecutions and even fewer opinions addressing the proper standard of proof for a finding of falsity. Many state courts have required more than a good faith basis or even evidence by a preponderance of falsity before allowing cross-examination on prior sexual assault allegations on the theory that the rape shield rule protects the victim from such cross absent evidence of falsity. Some state jurisdictions have required clear and convincing evidence and others have required evidence that the prior accusations are “demonstrably false.” *See White v. Coplan*, 399 F.3d 18 (1<sup>st</sup> Cir. 2005) (discussing New Hampshire requirement of clear and convincing evidence of “demonstrable falsehood”).

<sup>45</sup> *See Nevada v. Jackson*, 569 U.S. 505 (2013) (“[T]he Constitution guarantees criminal defendants a meaningful opportunity to present a complete defense.”) and *Olden v. Kentucky*, 488 U.S. 227 (1988). *See also* Edward J. Imwinkelried & Norman M. Garland, *Exculpatory Evidence: The Accused’s Constitutional Right to Introduce Favorable Evidence* 59 (5th ed. 2015).

<sup>46</sup> *See Holmes v. South Carolina*, 547 U.S. 319 (2006) (rule of exclusion did not rationally serve any discernible purpose); *Rock v. Arkansas*, 483 U.S. 44, 61 (1987) (rule arbitrary); *Chambers v. Mississippi*, 410 U.S. 284, 302–303

The Court has also found that certain evidentiary limitations on a defendant’s right to cross-examine a testifying witness violate his Sixth Amendment right of confrontation.<sup>47</sup> Rule 412 carves out a broad exception to the prohibition on evidence of a victim’s prior acts in criminal cases when their “exclusion would violate the defendant’s constitutional rights.”<sup>48</sup>

Defendants have argued that the exclusion of extrinsic evidence of a victim’s prior false accusations of sexual assault violated their right to present a defense and that a court’s refusal to permit cross-examination of a victim regarding prior false accusations of assault undermined their right to confrontation. Many federal courts have rejected such constitutional challenges to the exclusion of prior false accusation evidence and impeachment.<sup>49</sup>

In *Nevada v. Jackson*, the Supreme Court held that the Nevada Supreme Court did not unreasonably apply Supreme Court precedent when it found that the exclusion of extrinsic evidence of an alleged victim’s prior false accusations of sexual assault did not violate the

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(1973) (State did not even attempt to explain the reason for its rule); *Washington v. Texas*, 388 U.S. 14, 22 (1967) (rule could not be rationally defended).

<sup>47</sup> See, e.g., *Olden v. Kentucky*, 488 U.S. 227, 231 (1988); *Delaware v. Van Arsdall*, 475 U.S. 673, 678–679 (1986) (“[A] criminal defendant states a violation of the Confrontation Clause by showing that he was prohibited from engaging in otherwise appropriate cross-examination designed to show a prototypical form of *bias* on the part of the witness ....”) (emphasis added).; *Davis v. Alaska*, 415 U.S. 308, 315–316 (1974).

<sup>48</sup> Fed. R. Evid. 412(b)(1)(C).

<sup>49</sup> See, e.g., *Hughes v. Raines*, 641 F.2d 790, 793 (9th Cir. 1981) (affirming denial of habeas petition alleging a violation of the defendant’s confrontation rights due to the trial court’s refusal to allow cross-examination of the victim regarding a prior accusation of rape “to attack the general credibility of the witness on the basis of an unrelated prior incident.”); *United States v. Bartlett*, 856 F.2d 1071, 1089 (8th Cir.1988) (refusal to allow cross-examination of victim regarding prior allegedly false allegation of rape to attack her general credibility is constitutional and proper under Rules 412 and 608(b)); *United States v. Payne*, 944 F.2d 1458, 1569 (9th Cir.1991) (“We have found ... that a trial court’s limitation of cross-examination on an unrelated prior incident, where its purpose is to attack the general credibility of the witness, does not rise to the level of a constitutional violation of the defendant’s confrontation rights.”); *Quinn v. Haynes*, 234 F.3d 837, 844–48 (4th Cir.2000) (upholding on habeas review exclusion of impeachment evidence regarding alleged victim’s prior accusations of sexual assault, where that evidence went to “general credibility” rather than motive to fabricate); *Boggs v. Collins*, 226 F.3d 728, 737 (6th Cir. 2000) (“When faced with alleged prior false accusations of rape, federal courts have ... [found] cross-examination constitutionally compelled when it reveals witness bias or prejudice, but not when it is aimed solely to diminish a witness’s general credibility.”); *United States v. Frederick*, 683 F.3d 913, 916 (8th Cir. 2012)(“We find that Frederick’s rights under the Confrontation Clause were not violated by the district court’s decision to disallow him from asking the girls about prior instances of sexual abuse because the probative value of the evidence was minimal, in large part because Frederick’s offer of proof failed to demonstrate that the prior accusations were false.”); *United States v. A.S.*, 939 F.3d 1063, 1075 (10th Cir. 2019) (Assuming that Rule 412 applied to bar evidence of prior assault of victim, constitution did not require exception where prior encounter was not shown to be false and did not reveal victim bias to concoct allegations against defendant); *Dennis v. Mazza*, 814 F. App’x 28, 33 (6th Cir. 2020)(Kentucky courts did not violate clearly established Supreme Court precedent in denying cross of victim regarding prior false allegations under state evidence rules where “Kentucky’s rape-shield law does not bar evidence of a prior false allegation; rather, defendants accused of sex crimes may attack the alleged victim’s credibility by showing “that there is a distinct and substantial probability that the prior accusation was false.” Defendant failed to show that the prior allegation was demonstrably false and therefore was denied cross.).

defendant’s federal constitutional right to present a complete defense.<sup>50</sup> Most federal courts have also rejected defense arguments that extrinsic evidence of prior false accusations is constitutionally mandated.<sup>51</sup> Under unique circumstances, lower federal courts have found a constitutional right to present evidence of a victim’s prior false accusations, however.

In an unpublished opinion in *Secretary for the Florida Department of Corrections v. Baker*, the Eleventh Circuit affirmed the grant of habeas corpus because the state trial court excluded evidence that the victim in a sexual assault case had repeatedly falsely accused family members of sexual assault:

D.A.’s truthfulness was key to the prosecution, and the evidence of her prior false accusations not only spoke to her general character for truthfulness, but particularly attacked her truthfulness and motivation for testifying as they related directly to her allegation against Baker. The evidence that D.A. had habitually lied about sexual assaults by family members had “strong potential to demonstrate the falsity of [her] testimony” in this case, and “a reasonable jury might have received a significantly different impression of [her] credibility had defense counsel been permitted to pursue his proposed line of cross-examination.” Furthermore, the trial court only limited the testimony in light of the state’s rules of evidence regarding impeachment, rather than out of concerns such as harassment, prejudice, confusion, or a policy of protecting sexual-assault victims. Supreme Court precedent clearly indicates that the exclusion of the false-accusation evidence violated Baker’s rights under the Sixth and Fourteenth Amendments. Thus, failure to find a Confrontation Clause violation would constitute an unreasonable application of federal law.<sup>52</sup>

In *United States v. Stamper*,<sup>53</sup> a district court held that evidence of an alleged sexual assault victim’s prior false accusations was constitutionally mandated. In that case, the victim had written

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<sup>50</sup> Nevada v. Jackson, 569 U.S. 505 (2013).

<sup>51</sup> See, e.g., United States v. Tail, 459 F.3d 854, 860 (8th Cir. 2006) (finding no constitutional right to present evidence of victim’s alleged prior false accusations of others where “[t]he evidence of falsity is weak, and there is no substantial showing that J.H.’s allegations against Tail are part of a broader scheme involving contrived allegations against Ortega and Frank Johnson, or that they shared a common motivation. Admission of this evidence would have triggered mini-trials concerning allegations unrelated to Tail’s case, and thus increased the danger of jury confusion and speculation.) (citations omitted); United States v. Coriz, 861 F. App’x 190, 199 (10th Cir. 2021) (rejecting defense argument that exclusion of victim’s accusation of sexual assault against another violated his constitutional right to present a defense because the defendant “had only weak evidence of falsity. We agree with the district court that in light of such weak evidence of falsity, the probative value of these allegations was low and was substantially outweighed by the risk of confusing the jury and turning Coriz’s trial into a mini-trial on C.T.’s allegations against D.Y.”).

<sup>52</sup> 406 F. App’x 416, 424–25 (11th Cir. 2010) (citations omitted).

<sup>53</sup> 766 F. Supp. 1396, 1400 (W.D.N.C. 1991), *aff’d sub nom.* In re One Female Juv. Victim, 959 F.2d 231 (4th Cir. 1992).

a letter to a friend stating that her prior accusations were “not true,” and the defendant sought to introduce evidence of the prior false accusations to show the victim’s motive to falsely accuse him. The court agreed that the prior false accusation evidence was constitutionally required:

Defendant offers evidence of complainant’s prior allegations to show that, because she previously made false allegations of sexual abuse and fondling, the complainant is now making false accusations of a similar nature, with the same intent, motivation and plan to move her residence from one parent to another and to divert attention from herself and place it on an alleged perpetrator to show her motivation, intent and plan in this case ... In order to confront the complainant effectively, to elucidate the facts and legal issues here in question fully, and to present a defense in a constitutionally viable trial, Defendant must be allowed to set before the jury the proffered evidence of ulterior motives of the complainant. The sixth amendment and *Davis* mandate that the proffered evidence be admitted.” Defendant, a law enforcement dispatcher before these charges were brought, seeks to offer exculpatory evidence that the complainant’s charges against him were motivated by the bias and ulterior motive of a willful adolescent from a broken home bent on manipulating those who had custody of her and control of her activities ... While it is true that the complainant now contends that she did not mean what she said in her letter, and withdrew her allegations of sexual abuse solely to keep Candi in her home, what her actual behavior and motivations might have been are for the jury to determine.<sup>54</sup>

Therefore, in rare cases, federal courts have found that the Constitution mandates evidence or impeachment regarding a victim’s prior false accusations of sexual assault.

## **II. A New Federal Rule of Evidence Regulating Prior False Accusation Evidence**

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<sup>54</sup> *Id.* See also *White v. Coplan*, 399 F.3d 18, 26 (1st Cir.2005) (on habeas, concluding that prisoner was entitled to cross-examine complainants regarding prior accusations but noting that court is “not endorsing any open-ended constitutional right to offer extrinsic evidence”); *Sussman v. Jenkins*, 636 F.3d 329, 356 (7th Cir. 2011)(finding in habeas case that trial court ruling excluding victim’s prior false accusation against his father “would have” violated defendant’s confrontation rights if counsel had timely moved for its admission because it would have revealed a specific bias to manufacture the same allegations as levied in the instant case.); *Redmond v. Kingston*, 240 F.3d 590, 591–92 (7th Cir. 2001) (granting habeas on grounds that defendant’s confrontation rights were denied by trial court’s refusal to allow him to question alleged victim about false, recanted accusation of rape by another only eleven months prior to charged offense: “the fact that the girl had led her mother, a nurse, and the police on a wild goose chase for a rapist merely to get her mother’s attention supplied a powerful reason for disbelieving her testimony eleven months later about having sex with another man, by showing that she had a motive for what would otherwise be an unusual fabrication.”).



To provide explicitly for the admissibility of evidence of an alleged victim’s prior false accusations, Professor Erin Murphy has proposed the adoption of new Federal Rule of Evidence 416. The Committee unanimously decided to consider the proposal at its Fall 2023 meeting.

## **A. Professor Murphy’s Proposal**

Modified slightly to conform to the style of the Federal Rules of Evidence, Professor Murphy’s proposed new rule would provide as follows:

### **Rule 416. Prior False Accusation.**

**(a) Admissibility.** Evidence of a person’s alleged prior false accusation may be admitted to attack the person’s credibility if the following requirements are met:

**(1) Proof of Falsehood and Awareness of Falsehood.** The falsehood of the prior accusation, and the person’s awareness of its falsehood, have both been established by a preponderance of the evidence. The court must consider the fact that the complaint was not pursued, and that the accused denied the accusation, but these facts do not alone or together establish falsehood or awareness of falsehood by a preponderance of the evidence.

**(2) Nature of the False Claim.** The prior accusation is similar in nature or of equal or greater magnitude to the charged offense.

**(b) Notice.** The proponent must provide reasonable written notice of any such evidence that the proponent intends to offer at trial, so that the opponent has a fair opportunity to meet it. If the prior false accusation relates to an act of alleged sexual misconduct, the notice must comply with Rule 412(c).

**(c) Extrinsic Evidence.** Extrinsic evidence of the prior false accusation is admissible if the person does not testify or testifies and denies having made the prior accusation or denies its falsehood.

It is important to note several features of this proposed new rule. First, the provision applies to all false accusations, including those outside the sexual assault context. Although the cases dealing with a victim’s prior false accusations arise primarily in the sexual assault or abuse context, the possibility of false accusation could arise in other classes of cases, such as domestic violence.<sup>55</sup> The proposed rule would permit admission of prior false accusations in such cases and treat all such evidence similarly.<sup>56</sup>

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<sup>55</sup> See, e.g., *Shelnutt v. State*, 564 S.E.2d 774 (Ga. Ct. App. 2002) (precluding evidence of prior false accusations in a domestic violence case).

<sup>56</sup> *Impeaching with an Alleged Prior False Accusation*, *supra* n. 3 at 3 (“it is important to note that the logic behind the rule, and thus the rule itself, applies to *all* case types and to *all* witnesses, not just sexual assault complainants.”).

If it were inclined to pursue a new Rule 416, the Committee might consider whether to narrow the provision to prior false accusations of sexual misconduct. It is in this class of cases that courts have primarily struggled with prior false accusations evidence. And, of course, Federal Rules of Evidence 412-415 are narrowly tailored to such cases. As discussed below, Professor Ed Imwinkelried has suggested that admission of prior false accusations is uniquely necessary in sexual assault cases to deal with the frequent credibility issues inherent in those cases and to create needed symmetry between treatment of a defendant's prior acts of sexual misconduct and a victim's prior false accusations.<sup>57</sup> Rather than invite unforeseen consequences in other contexts, the Committee could decide to limit the amendment to the sexual misconduct context in which prior false accusation evidence has plagued the courts.

If the Committee were inclined to narrow the proposed provision to sexual misconduct cases, it could also consider changing the reference to a "person's" alleged prior false accusations to a "victim's" prior false accusations. Although Professor Murphy suggests that the proposed rule would apply to "all witnesses" who might accuse, it is primarily designed to address evidence that an accuser has previously made false accusations and would seem to be aimed primarily at victims. Rule 412 covers criminal and civil cases "involving alleged sexual misconduct" and references a "victim's" other sexual behavior or sexual predisposition. Swapping the term "person" for the term "victim" in a new Rule 416 would thus make the provision consistent with Rule 412.

Second, this proposed provision requires a trial court to find the knowing falsity of the person's prior accusation by a preponderance of the evidence under Rule 104(a). Thus, it provides protection to victims by converting the question of the commission of the prior act from one of conditional relevance for the jury to a preliminary question of admissibility exclusively for the court. The provision goes one step further, specifying showings that are insufficient to satisfy the Rule 104(a) preponderance standard. The proposed rule states that an accused's denial of the prior accusation and the failure of the accuser or law enforcement to pursue the accusation are insufficient to support a trial court's finding of falsity. Rule 104(a) typically leaves it to a trial judge to decide which information to utilize to find admissibility requirements satisfied and to weigh that information.<sup>58</sup> Thus, the proposed provision limits to some extent the discretion typically enjoyed by a trial judge in determining preliminary questions.

There is some precedent in the Rules, however, for prescribing the information necessary to support a Rule 104(a) finding. In establishing the requirements for admission of agent and co-conspirator hearsay, Rule 801(d)(2) provides that a hearsay statement "must be considered but does not by itself establish the declarant's authority under (C); the existence or scope of the

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<sup>57</sup> See Edward J. Imwinkelried, *Should Rape Shield Laws Bar Proof That the Alleged Victim Has Made Similar, False Rape Accusations in the Past?: Fair Symmetry with the Rape Sword Laws*, 47 U. Pac. L. Rev 709 (2016).

<sup>58</sup> Fed. R. Evid. 104(a) ("The court must decide any preliminary question about whether ... evidence is admissible. In so deciding, the court is not bound by evidence rules, except those on a privilege.").

relationship under (D); or the existence of the conspiracy or participation in it under (E).”<sup>59</sup> Rule 801(d)(2) thus tells trial judges which information they should utilize in making a Rule 104(a) finding and specifies information that is insufficient to support the finding. Proposed Rule 416 would impose a similar limitation on the information sufficient to support a finding of falsity under Rule 104(a).

Proposed Rule 416 also imposes a limitation on the nature of the prior accusations it admits, requiring a prior accusation that “is similar in nature or of equal or greater magnitude to the charged offense.” On the one hand, requiring similarity between a victim’s prior false accusation and a current accusation makes eminent sense and is consistent with the treatment of evidence of a person’s “other crimes, wrongs, or acts” under Rule 404(b)(2) and with federal courts’ Rule 403 analysis in evaluating Rule 608(b) impeachment. This similarity requirement in proposed Rule 416 presents several concerns, however.

First, proposed Rule 416 is not limited to use in criminal cases. The Federal Rules of Evidence apply equally in criminal and civil cases except as explicitly provided.<sup>60</sup> Nothing in the admissibility provision of proposed Rule 416(a) limits its application to criminal cases. Yet the limitation on the nature of the prior accusation seems to contemplate use of Rule 416 only in criminal cases by comparing the prior accusation to the “charged offense.” The Committee could consider limiting application of Rule 416 to criminal cases, especially in light of the constitutional concerns applicable to important defense evidence like a victim’s prior false accusations in criminal cases. Limiting proposed Rule 416 in this manner would be inconsistent with the other provisions in Article Four of the Federal Rules dealing with sex offense cases, however. The rape shield rule applies in both civil and criminal cases. And while Rules 413 and 414 apply only in criminal cases, Rule 415 creates an analog in civil cases raising allegations of sexual assault or child molestation. If Rule 416 is to apply to civil and criminal cases, the prior false accusation should not have to be similar to the “charged offense.” If it retains the limitation on the nature of the false accusation in the text of the provision, the Committee could consider a requirement that the prior false accusation be similar to “conduct alleged in the instant case” or to a “current accusation” in an effort to cover both criminal and civil cases.

Second, a textual requirement that the prior false accusations be “similar” and “of equal or greater magnitude” would necessitate difficult line-drawing and could invite costly litigation over prior false accusations. It would seem that the “similarity” required by proposed Rule 416 would not be of the type necessary to establish admissibility under Rule 404(b)(2) but would be satisfied on some lesser showing. If a prior false accusation involved rape by an acquaintance, for example, would that be sufficiently “similar” to an accusation of rape by a stranger in the instant case? The

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<sup>59</sup> Fed. R. Evid. 801(d)(2).

<sup>60</sup> Compare Fed. R. Evid. 404(a)(1) (imposing broad prohibition on evidence of character to prove conduct that applies in both civil and criminal cases) with Fed. R. Evid. 404(a)(2) (making exceptions to character prohibition in criminal cases only).

requirement of a false accusation of “equal or greater magnitude” would pose similar concerns. Would a prior false accusation of attempted sexual assault be of “equal magnitude” in a case alleging rape? Rather than including a limitation on the nature of the prior false accusation in rule text that could invite error and litigation, the Committee could consider including a reference to Rule 403 in an accompanying Committee note, describing the trial court’s discretion to weigh the probative value of a prior false accusation against its tendency to cause unfair prejudice and citing factors such as the similarity of the prior accusation and remoteness in time as considerations.<sup>61</sup>

The purpose identified for admitting prior false accusation evidence under proposed Rule 416 also raises concerns. In its opening clause, proposed Rule 416 provides that evidence of a person’s prior false accusation is admissible “to attack the person’s credibility.” This is problematic for two reasons. First, Article Six of the Federal Rules of Evidence governs “Witnesses” and contains provisions relating to impeachment and to attacks on credibility. It appears inconsistent with the organization of the Rules to place a provision regulating an “attack” on “credibility” in Article Four of the Rules relating to “Relevance and its Limits.” Where evidence of character otherwise regulated by Rule 404 is important to the impeachment of testifying witnesses, Rule 404(a)(3) depends upon Rules 607, 608, and 609 to regulate those impeaching attacks. Second, proposed Rule 416(c) permits evidence of a prior false accusation to be admitted even if the accuser *does not testify*. If the person does not testify, it is difficult to see how the person’s prior false accusations are being offered to “attack credibility.”<sup>62</sup>

If the Committee is inclined to proceed with consideration of Rule 416, it may make sense to remove this limitation on the purpose of the false accusation evidence so that the rule simply provides that “Evidence of a person’s prior false accusation may be admitted if...” This would spell out *no purpose* and leave the purpose for admitting false accusations to case-by-case consideration. If the Committee concludes that it is important to include a stated purpose for this evidence in a new rule, the proposed rule could be modified to allow a prior false accusation to be admitted “to show the falsity of a current accusation if...” The policy behind the proposed new rule is that an accuser’s prior false accusation should be admissible to suggest a false accusation in a pending case if that prior false accusation is established by a preponderance of the evidence and is sufficiently similar. If this is so, perhaps the provision should expressly articulate this purpose.

Proposed Rule 416 also characterizes the admissible evidence as a “prior” false accusation by a person. The use of the word “prior” may suggest a temporal requirement that the allegedly false

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<sup>61</sup> Omitting any similarity requirement from rule text would also eliminate the need to compare the prior false accusation to “the charged offense.”

<sup>62</sup> It is possible that prior false accusations could be used to attack the credibility of a non-testifying victim whose hearsay statements are admitted for their truth. *See* Fed. R. Evid. 806 (“When a hearsay statement ... has been admitted in evidence, the declarant’s credibility may be attacked, ... by any evidence that would be admissible for those purposes if the declarant had testified as a witness.”). But proposed Rule 416 is not limited to circumstances in which the person’s statements are admitted either.

accusation precede the events giving rise to the instant action. Rule 404(b) instead regulates admissibility of a person’s “other” crimes, wrongs, or acts to avoid any timing limitation. Courts have found acts committed subsequent to the charged acts admissible under Rule 404(b)(2).<sup>63</sup> It may be possible for a victim’s false accusation to *follow* the events and accusation giving rise to the current action. Although subsequent false accusations may not be typical, it would seem optimal to remove the modifier “prior” from proposed Rule 416.

Finally, proposed Rule 416(c) allowing “extrinsic evidence” to be admitted seems superfluous where Rule 416(a) would admit “evidence” of a person’s alleged false accusation. Presumably, if Rule 416(a) provides that “evidence” is admissible, it necessarily means that “extrinsic evidence” is admissible. All the evidence admitted through Article Four would be characterized as “extrinsic evidence.” The distinction between “extrinsic evidence” and cross-examination questions is only pertinent in the context of impeachment regulated under Article Six of the Rules. The reference to “extrinsic evidence” in proposed Rule 416(c) is designed to distinguish between circumstances in which the person who made the false accusation testifies at trial and circumstances in which she does not, allowing extrinsic evidence only if the person *does not testify* or *testifies but denies the false accusation*. The Committee may wish to explore drafting alternatives that eliminate the overlapping references to “evidence” and “extrinsic evidence” in the proposal.

## **B. Drafting Possibilities for a New False Accusation Rule**

Professor Murphy’s proposal could be modified only slightly to limit the amendment to the sex offense context, to remove any temporal requirement of a “prior” accusation, and to state a purpose for false accusation evidence other than an “attack on credibility” as follows:

### **Rule 416. ~~Prior~~-False Accusation in Sex Offense Cases.**

**(a) Admissibility.** Evidence of a ~~person’s~~ victim’s false accusation [involving other alleged sexual misconduct] may be admitted ~~to attack the person’s credibility~~ [to show the falsity of a current accusation involving sexual misconduct] if the following requirements are met:

**(1) Proof of Falsity<sup>64</sup> and Awareness of Falsity.** The ~~falsity~~ falsity of the prior accusation, and the ~~person’s~~ victim’s awareness of its ~~falsity~~ falsity, have both been established by a preponderance of the evidence. The court ~~must~~ may consider the fact that the complaint was not pursued, and that the accused denied the accusation, but these facts do not alone or together establish ~~falsity~~ falsity or awareness of ~~falsity~~ falsity by a preponderance of the evidence.

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<sup>63</sup> See *United State v. Grady*, 88 F.4<sup>th</sup> 1246, 1258 (8<sup>th</sup> Cir. 2023) (Rule 404(b) embraces not only prior acts, but subsequent acts as well).

<sup>64</sup> It seems that the word “falsehood” is typically a noun that would be inappropriate in modifying the term “accusation.” The modifier “falsity” seems more appropriate grammatically but perhaps the stylists can suggest the optimal grammatical choice.

(2) ***Nature of the False Claim Accusation.*** The ~~prior~~ false accusation is similar in nature or of equal or greater magnitude to the ~~charged offense~~ current accusation.

(b) ***Notice and Procedure.*** The proponent must provide reasonable written notice of any such evidence that the proponent intends to offer at trial, so that the opponent has a fair opportunity to meet it. If the ~~prior~~ [evidence of] the false accusation [may prove that an alleged victim engaged in other sexual behavior] ~~relates to an act of alleged sexual misconduct~~, the [proponent must comply] ~~notice must comply~~ with [the procedure to determine admissibility provided by] Rule 412(c).

(c) ***Extrinsic Evidence.*** Extrinsic evidence of the ~~prior~~ false accusation is admissible if the ~~person~~ victim does not testify or testifies and denies having made the ~~prior~~ false accusation or denies its falsity~~hood~~.

These modifications would retain the textual limitation on the nature of the false accusation and the subsection (c) reference to “extrinsic evidence,” however.

A more drastic modification of the proposal could relegate the nature of the false accusation to a Committee note, directing courts to consider Rule 403 in admitting false accusation evidence, and could create separate subsections distinguishing cases in which victims testify from those in which they do not to avoid overlapping subsections (a) and (c) that admit “evidence” and “extrinsic evidence.” Such a rule might provide as follows:

#### **Rule 416. False Accusation.**

(a) ***When A Victim Does Not Testify.*** Evidence of a victim’s false accusation involving other alleged sexual misconduct may be admitted to show the falsity of a current accusation involving sexual misconduct when the victim does not testify if the falsity of the accusation, and the victim’s awareness of its falsity, have both been established by a preponderance of the evidence. The court may consider the fact that the complaint was not pursued, and that the accused denied the accusation, but these facts do not alone or together establish falsity or awareness of falsity by a preponderance of the evidence.

(b) ***When a Victim Testifies.*** Extrinsic evidence of a victim’s false accusation involving other alleged sexual misconduct that is established by a preponderance of the evidence is admissible if the victim testifies and denies having made the accusation or denies its falsity.

(c) ***Notice and Procedure.*** The proponent must provide reasonable written notice of any such evidence that the proponent intends to offer at trial, so that the opponent has a fair opportunity to meet it. If the evidence of the false accusation may prove that an alleged victim engaged in other sexual behavior, the proponent must comply with the procedure to determine admissibility provided by Rule 412(c).

This proposal would still have the anomalous effect of regulating impeachment in Article Four of the Rules, however. To protect the structural and terminological integrity of the Rules, the Committee could consider *two amendments*. An Article Four amendment (perhaps new Rule 416 or perhaps an amendment to Rule 404(b)) could allow “evidence” (and not “extrinsic evidence”)

of a person’s false accusation to be admitted only *if the person does not testify* on the showing of falsity required by Professor Murphy’s proposed provision. This provision could reference Rule 608 for circumstances in which the accuser testifies. This would be consistent with Rule 404(a)(3)’s existing cross-reference to the impeachment provisions. A defendant could thus admit evidence of a victim’s false accusations under the Article Four provision even in cases in which the victim declines to take the stand. Regulation of impeachment of a testifying witness would be left to Article Six where it belongs. A second amendment to Rule 608 – perhaps a new Rule 608(c) – could regulate the impeachment of *a testifying witness* with false accusation evidence, allowing cross-examination on such conduct upon a heightened showing of falsity and explicitly authorizing admission of “extrinsic evidence” if a witness denies making the false accusation.

Alternatively, should the Committee decide to pursue an Article Four amendment to admit “extrinsic” evidence of a false accusation, it could choose to avoid regulating impeachment altogether. If evidence of a false accusation is admissible even *without testimony* as proposed Rule 416 provides, it would seem unnecessary to amend Rule 608(b) to allow for “extrinsic evidence.” The Advisory Committee note to a new Rule 416 could make clear that Rule 403 applies to the admission of false accusation evidence. Along with the nature of the prior accusation, its similarity and recency, courts could consider the *need* for the evidence in light of a victim’s testimony and denial on cross-examination. Such an amendment might simply eliminate the textual requirement regarding the “nature” of the false accusation and subsection (c) altogether, as follows:

**Rule 416. False Accusation in Sex-Offense Cases.**

**(a) Admissibility.** Evidence of a victim’s false accusation involving other alleged sexual misconduct may be admitted to show the falsity of a current accusation involving sexual misconduct.

**(b) Proof of Falsity and Awareness of Falsity.** The falsity of the prior accusation, and the victim’s awareness of its falsity, must be established by a preponderance of the evidence. The court may consider the fact that the complaint was not pursued, and that the accused denied the accusation, but these facts do not alone or together establish falsity or awareness of falsity by a preponderance of the evidence.

**(c) Notice and Procedure.** The proponent must provide reasonable written notice of any such evidence that the proponent intends to offer at trial, so that the opponent has a fair opportunity to meet it. If the evidence of the false accusation may prove that an alleged victim engaged in other sexual behavior, the proponent must comply with the procedure to determine admissibility provided by Rule 412(c).

In sum, should the Committee proceed with a false accusation amendment, there are several possible amendment avenues that could be further explored.

### **III. The Merits and Demerits of a False Accusation Rule**

An amendment to the Federal Rules of Evidence covering false accusations could offer some benefits and improvements over the existing regulating scheme. There are some drawbacks and pitfalls inherent in a false accusations rule, however, that the Committee should carefully consider. If the Committee is inclined to pursue such an amendment, further study – including a fifty-state survey on false accusation evidence – would be advisable.

### **A. Benefits of an Amendment**

A Federal Rule of Evidence governing false accusations could be beneficial for several reasons. First, as illustrated above, the path that must be followed through the existing Rules to evaluate the admissibility of false accusation evidence is a tortured one involving Rules 104, 403, 404, 412, and 608.<sup>65</sup> Courts and litigants rarely chart a clear course through the existing Rules when dealing with false accusation evidence. Evidence scholars have long called for reform and have repeatedly advanced proposals for admitting false accusations.<sup>66</sup> Therefore, an amended rule could address the complexity inherent in dealing with this evidence under existing Rules and respond to a longstanding call for clarification.

The provisions that currently apply to false accusation evidence are not only complex; they may lead to outcomes that some may perceive as both over- and underinclusive. For example, in cases in which a victim does not testify at trial, Rule 404(b) severely curtails evidence that a victim previously falsely accused a person in order to suggest a false accusation on the occasion in question. Only if the victim’s prior act fits within one of the “permitted purposes” defined by Rule 404(b)(2) will such evidence be admissible in a case in which the victim does not become a witness. Professor Murphy’s proposed amendment would admit false accusations without a Rule 404(b) analysis even in cases in which a victim does not testify. Further, complex questions regarding the applicability of Rule 412 to false accusation evidence that *is* otherwise admissible pose another obstacle to admissibility. A new rule clarifying the admissibility of “false” accusations would clearly place such evidence outside Rule 412.

Even where false accusation evidence appears to be admissible under existing provisions, the standard of proof for showing falsity remains unclear. The *Huddleston* standard applies to Rule 404(b)(2) evidence, suggesting that a defendant would need only prima facie evidence of a false accusation. It is unclear, however, whether prima facie evidence of falsity is sufficient to remove a victim’s prior false accusation involving sexual misconduct from the protection of Rule 412.<sup>67</sup>

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<sup>65</sup> Christopher Bopst, *Rape Shield Laws and Prior False Accusations of Rape: The Need for Meaningful Legislative Reform*, 24 J. Legis. 125, 142 (1998) (“The rules surrounding prior false rape accusations are a judicial morass.”).

<sup>66</sup> *Id.* (proposing a new federal provision).

<sup>67</sup> *Id.* at 144-45 (pre-trial notice and hearing necessary for PFA’s because may constitute protected victim sexual history if *not* false).



An amended rule clarifying that the judge must find falsity by a preponderance under Rule 104(a) whenever false accusation evidence is offered would resolve this conundrum.

Under existing rules, in a case in which a victim *does* take the stand, Rule 608(b) typically requires only a “good faith basis” to inquire about a witness’s prior dishonest acts – a standard that seems inadequately protective for prior false accusation evidence offered in a sexual assault case. An amendment requiring that a trial judge find falsity by a preponderance of the evidence under Rule 104(a) would ensure proper vetting of prior false accusations even if they are used only on cross-examination and further protect alleged sexual assault victims from inquiries into past sexual conduct in keeping with Rule 412. Existing Rule 608(b) forbids extrinsic evidence of a victim’s false accusation when a victim denies having made it during cross-examination. As Professor Murphy has suggested, this limitation may eliminate any benefit to the defense from raising even substantiated prior false accusations. If the defense is stuck with a victim’s denial of the false accusation, a jury may assume that there was no prior false accusation when extrinsic evidence fails to appear and may hold an unwarranted attack on the victim against the defense. Allowing extrinsic evidence of a substantiated false accusation to be admitted when a testifying victim denies having made it could ensure the effectiveness of this impeachment technique.

As noted above, distinguished evidence scholar and expert on “other acts” evidence, Ed Imwinkelried, has made a compelling case for the admissibility of evidence of a victim’s similar prior false accusations in sexual assault cases:

The premise of the rape sword laws is that the outcome of the typical rape prosecution turns largely on the jurors' assessment of the credibility of the alleged victim. Based on that premise, the rape sword laws allow the prosecution to bolster the alleged victim’s credibility by presenting corroborating evidence sufficient to prove that in the past, the accused has committed similar sexual crimes. Positing the same premise, the rape shield laws should be construed to enable the defense to attack the alleged victim’s credibility by presenting evidence sufficient to prove that in the past, the alleged victim has made similar, false accusations. Proof of the alleged victim’s prior false accusations is just as corroborative of the accused’s claim that the alleged victim is falsely accusing him as proof of the accused’s prior sexual assaults is corroborative of the alleged victim’s claim that he assaulted her. In this setting, formulating symmetrical evidentiary rules is an important step toward ensuring the fairness of the adversary trials in rape prosecutions.<sup>68</sup>

Finally, as described above, the exclusion of some false accusation evidence offered by the defense in a criminal case, albeit narrowly defined by the federal courts, could violate the defendant’s constitutional rights to present a defense or to confront his accuser. Amending the Federal Rules of Evidence to pave the way for false accusation evidence presented by the defense

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<sup>68</sup> Edward J. Imwinkelried, *Should Rape Shield Laws Bar Proof That the Alleged Victim Has Made Similar, False Rape Accusations in the Past?: Fair Symmetry with the Rape Sword Laws*, 47 U. Pac. L. Rev 709, 738–39 (2016).

in a criminal case could decrease the likelihood that the Evidence Rules are applied in a manner that violates constitutional protections.

## **B. Potential Downsides to a False Accusation Amendment**

There are several potential downsides to amending the Federal Rules of Evidence to specifically address false accusation evidence, however.

First, although the path through the existing Rules may be tortured, the Federal Rules of Evidence *have been* applied to admit evidence of a victim’s prior false accusations under appropriate circumstances. While the Rules may not provide expressly or fully for the admissibility of false accusation evidence, there are avenues of admissibility currently available. Even if false accusations evidence should be admissible in certain circumstances, it may be unnecessary to add a rule to cover evidence that can be admitted under existing provisions.

It might make sense to cover false accusation evidence specifically if federal courts were routinely encountering this evidence and struggling to ascertain its admissibility. This evidence has predominantly been offered in sexual assault cases, however. As noted above, very few sexual assault cases are prosecuted in federal court with only 2.3% of federal sentencings in 2022 arising out of such prosecutions. Where sexual assault cases are primarily prosecuted at the state level, there may be little need for a *federal* rule covering prior false accusation evidence. It is true that Federal Rules of Evidence 412-415 are specifically designed to apply to sexual misconduct cases notwithstanding state jurisdiction over most cases. It has been suggested that Rules 412-415 were enacted as important models for the states in developing their own evidentiary rules regarding the prosecution of sexual misconduct cases. As Professor Murphy points out, the states have been dealing with prior false accusation evidence for a very long time due to their primary role in sexual misconduct enforcement and many have developed standards and provisions covering this evidence.<sup>69</sup> Where the states are ahead of the federal system on the issue of false accusation evidence, it is not clear that a federal “model” would be helpful or influential.

An amendment would reverse limitations on “other act” evidence that currently exist in Rule 404(b)(1) and on “extrinsic evidence” currently found in Rule 608(b). The Committee may be concerned that there is insufficient data supporting a departure from the important policies reflected in those existing limitations for false accusation evidence. Rule 404(b)(1) prohibits evidence of a person’s other crimes, wrongs or acts to show a propensity for certain behavior. Only when the other acts show something other than pure propensity, such as a person’s intent or motive, may they be admitted through Rule 404(b)(2). Amending the Rules to allow a victim’s prior acts of false accusation to be admitted is necessary only if those prior acts are only useful to prove the victim’s propensities to falsely accuse and are, thus, inadmissible under existing Rule 404(b)(1). Indeed, Professor Murphy describes prior false accusation evidence as revealing “a character or propensity to falsely accuse” and characterizes false accusation evidence as “propensity-credibility

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<sup>69</sup> *Impeaching with an Alleged Prior False Accusation*, *supra* n. 3 at n. 14 (listing state statutes governing false accusation evidence).

evidence, not non-propensity motive or scheme evidence.”<sup>70</sup> Therefore, proposed Rule 416 would pave the way for victim propensity evidence currently banned by the Rules. Professor Murphy argues that false accusations are more probative than generic propensity evidence because they “show a demonstrated willingness to directly harm *another* by making a false accusation.”<sup>71</sup> Still, the Committee may want to proceed cautiously in exempting a victim’s propensities to falsely accuse from the time-honored ban on character evidence.<sup>72</sup>

The legislative history underlying Rules 413-415 suggested that propensities for sexual misconduct are more predictive than other propensities to justify their removal from the Rule 404(b)(1) prohibition.<sup>73</sup> This assumption met with a great deal of criticism and some empirical evidence undermining it.<sup>74</sup> Before removing a victim’s propensity to falsely accuse from the general prohibition of Rule 404(b)(1), it is important to consider any evidence that this particular propensity is deserving of special treatment. The empirical evidence cited by scholars suggests an extremely low rate of false accusation of sexual misconduct. Further, scholars cite no data regarding the likelihood that a person who has falsely accused someone will do so again (at least at a rate higher than recidivism in other areas). Therefore, there may be inadequate justification for removing a victim’s propensity to falsely accuse from the Rule 404(b)(1) ban.

The limitation on extrinsic evidence of a testifying witness’s prior acts of dishonesty is also time-honored. The Rule 608(b) limitation on extrinsic evidence is designed to prevent inefficient distractions caused by proof of unrelated prior acts of dishonesty of a testifying witness. Although rigid, the limit on extrinsic evidence forecloses time-consuming detours into unrelated events that are valuable only in assessing credibility. Even with a requirement that a trial judge find a prior accusation false by a preponderance of the evidence, it is likely that victims and defendants will debate the falsity of prior accusations and seek to present evidence of the circumstances surrounding them. It is unclear that prior false accusations useful only to undermine the credibility of a current accusation are so different from all other dishonest acts of testifying witnesses that they necessitate the potentially costly admission of extrinsic evidence.<sup>75</sup>

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<sup>70</sup> *Impeaching with an Alleged Prior False Accusation*, *supra* n. 3 at 10.

<sup>71</sup> *Id.* at 12.

<sup>72</sup> See Christopher Bopst, *Rape Shield Laws and Prior False Accusations of Rape: The Need for Meaningful Legislative Reform*, 24 J. Legis. 125, 126 (1998) (“studies that have shown that the frequency of rape reports proven false, approximately two percent, mirrors the false reporting rates for other crimes.”).

<sup>73</sup> See Floor Statement of Representative Susan Molinari (Cong. Rec. H8991-92, August 21, 1994).

<sup>74</sup> See, e.g., Imwinkelried, UNCHARGED MISCONDUCT § 4.16 (1994) (recidivism is not higher among those convicted of sexual assault than among those convicted of other crimes); Duane, *The New Federal Rules of Evidence on Prior Acts of Accused Sex Offenders: A Poorly Drafted Version of a Very Bad Idea*, 157 F.R.D. 95 (1994).

<sup>75</sup> See *Nevada v. Jackson*, 569 U.S. 505, 511 (2013) (“The admission of extrinsic evidence of specific instances of a witness’ conduct to impeach the witness’ credibility may confuse the jury, unfairly embarrass the victim, surprise the prosecution, and unduly prolong the trial.”).

In the federal sexual misconduct cases that do exist, a new Rule expressly covering prior false accusations would undoubtedly invite increased attempts to rely on such evidence, perhaps even generating defense fishing expeditions into a victim’s sexual history. Notwithstanding the proposed requirement that a court find a victim’s prior accusations false by a preponderance of the evidence, a new rule paving the way for admission of a victim’s prior accusations of sexual misconduct could be seen as undermining the important and hard-won protections for victims in sexual assault cases. Even litigation over the admissibility of such prior accusations could deter a victim from reporting or pursuing sexual assault charges. And, an amendment could be viewed as assuming that victims of sexual assault are particularly likely to fabricate in a time when the #MeToo movement in a series of well publicized cases has called for the public to “believe women.”<sup>76</sup> The Federal Rules of Evidence, as currently configured, have corrected the harmful history of treating alleged victims of sexual assault with skepticism and opprobrium.<sup>77</sup> Although well intentioned, adding a rule to allow evidence of a victim’s prior false accusations and to exempt such acts from otherwise well-accepted prohibitions on propensity and extrinsic evidence could be perceived as turning back the clock on protections for sexual assault victims.<sup>78</sup> Given the tiny fraction of federal cases raising these issues, this risk may seem unjustified, particularly where the Constitution gives the defense the right to use this evidence in appropriate cases.

On the other side of the coin, drafting a provision that explicitly addresses the requirements for defendants seeking to admit false accusation evidence risks violating the rights of criminal defendants. Courts have noted the delicate balancing act involved in dealing with a victim’s history in sexual misconduct cases in analyzing Rule 412:

The rule “pits against each other two exceedingly important values—the need ‘to safeguard the alleged [sexual assault] victim against the invasion of privacy, potential embarrassment and sexual stereotyping that is associated with public disclosure of intimate sexual details,’ and the need to ensure that criminal defendants receive fair trials.”<sup>79</sup>

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<sup>76</sup> *Impeaching with an Alleged Prior False Accusation*, *supra* n. 3 at 3 (positing reluctance of legal actors “to take a side in what feels like a binary debate between those who ‘believe all women’ and those who, like Lord Hale, view rape as an accusation ‘easily to be made . . . and harder to be defended.’”).

<sup>77</sup> See 3A JOHN HENRY WIGMORE, *EVIDENCE IN TRIALS AT COMMON LAW* § 924a, at 736 (Chadbourn rev. 1970) (“Modern psychiatrists have amply studied the behavior of errant young girls and women coming before the courts in all sorts of cases. Their psychic complexes are multifarious, distorted partly by inherent defects, partly by diseased derangements or abnormal instincts, partly by bad social environment, partly by temporary physiological or emotional conditions. One form taken by these complexes is that of contriving false charges of sexual offenses by men.”).

<sup>78</sup> See Denise R. Johnson, *Prior False Allegations of Rape: Falsus in Uno, Falsus in Ominibus*, 7 *Yale J.L. & Feminism* 243, 253 (1995) (quoting Wigmore treatise and decrying “rape mythology” that allowed liberal impeachment with prior false allegations of sexual assault by a victim).

<sup>79</sup> *United States v. A.S.*, 939 F.3d 1063, 1076 (10th Cir. 2019).

Calibrating an amendment that specifically addresses false accusation evidence in a manner that accommodates the rights of both victim and defendant poses a serious challenge. As explained above, the Supreme Court held in *Huddleston* that the question of whether a person committed a prior act is one of conditional relevance. The act possesses probative value in evaluating the person's conduct in the instant case only if, in fact, the person committed it. In admitting a *defendant's* prior acts through Rules 404(b)(2) and 413-415, therefore, the prosecution need only present prima facie evidence that the defendant committed the prior act. Testimony by a witness with personal knowledge claiming that the defendant committed the prior act is sufficient to satisfy this standard. Analytically, the question of whether a victim made a prior false accusation is one of conditional relevance as well.<sup>80</sup> The victim's prior false accusation tends to suggest the falsity of her current allegation only if, in fact, she made the prior accusation, it was false, and she knew it was false.

To protect sexual assault victims and to reinforce Rule 412, the proposed amendment forces these questions into the Rule 104(a) category, requiring the trial judge to find by a preponderance that the victim made the accusation, that it was false, and that the victim knew it was false.<sup>81</sup> It explicitly states that testimony by a prior accused with personal knowledge claiming falsity as insufficient. Thus, the proposal would create a double standard. To show a criminal defendant's prior wrongful acts, only prima facie evidence is necessary, and the jury makes the decision about whether the defendant engaged in the prior misconduct. But to show an alleged victim's prior *wrongful* conduct, a more stringent standard would apply which prevents the jury from hearing about the prior false accusation unless the trial judge is satisfied by a preponderance that it occurred and restricts the information upon which a trial judge may rely in finding the prior false accusation. Such a distinction may be necessary and defensible to serve the important public policy of protecting sexual assault victims but may invite defense constitutional challenges.<sup>82</sup> Importantly, Rule 412 recognizes a criminal defendant's constitutional right to admit certain evidence regarding

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<sup>80</sup> See Edward J. Imwinkelried, *Should Rape Shield Laws Bar Proof That the Alleged Victim Has Made Similar, False Rape Accusations in the Past?: Fair Symmetry with the Rape Sword Laws*, 47 U. Pac. L. Rev 709, 732 (2016) (“In principle, it seems correct to apply Rule 104(b)'s conditional relevance standard here. If the jury decides that the alleged victim did not make another report or that the report was truthful, the jurors will naturally treat the defense questioning about the supposedly false report as irrelevant.”).

<sup>81</sup> But see Christopher Bopst, *Rape Shield Laws and Prior False Accusations of Rape: The Need for Meaningful Legislative Reform*, 24 J. Legis. 125, 142 (1998) (proposing rule admitting false accusations upon a finding by clear and convincing evidence that prior false accusations were made).

<sup>82</sup> See *White v. Coplan*, 399 F.3d 18, 26 (1<sup>st</sup> Cir. 2005) (reversing earlier holding that New Hampshire's requirement of clear and convincing evidence of “demonstrable falsehood” per se violated the Constitution but nonetheless holding that application of the standard violated the defendant's rights in the instant case); *Ellsworth v. Warden*, 333 F.3d 1, 6 (1<sup>st</sup> Cir. 2003) (Ellsworth argues for the first time that the state standard for the admission of such evidence—that prior false accusations be not only false but “demonstrably” so—is itself too demanding and therefore unconstitutional); *Abram v. Gerry*, 672 F.3d 45, 50 (1<sup>st</sup> Cir. 2012) (“we determined that although New Hampshire's “demonstrable falsity” standard was “generally defensible,” *id.*, *White* represented an “extreme case” in which application of this standard violated the Confrontation Clause.”).

victim history but makes no attempt to define the evidence constitutionally required with any specificity.<sup>83</sup>

If federal courts were routinely grappling with prior false accusation evidence, attempting to craft a Federal Rule of Evidence that walks the fine line between the rights of criminal defendants and those of sexual assault victims might be justified. Given that the federal courts are not the primary forum for addressing sexual assault allegations, however, there are significant risks inherent in striking the proper balance between the rights of victims and defendants in a specific rule.

#### **IV. Conclusion**

If the Committee wishes to proceed with consideration of an amendment to address a victim's prior false accusations in sexual misconduct cases, further study is warranted. First, the Committee could explore additional amendment alternatives as described above. A new Rule 416 could simply allow evidence of a victim's prior false accusations without any distinction drawn between testifying and non-testifying victims. If evidence of false accusations is admissible regardless of impeachment, it becomes less necessary to regulate the impeachment process. Or the Committee could explore the possibility of multiple amendments in order to appropriately address distinctions between the admission of false accusations through Article Four of the Federal Rules without regard to the victim's testimony and impeaching use of a testifying victims' prior false accusations under Rule 608(b). Because the states have made significant progress in crafting rules regarding prior false accusation evidence, a fifty-state survey analyzing the many distinctions in state handling of false accusation evidence would also be helpful in formulating an optimal new federal provision.

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<sup>83</sup> Fed. R. Evid. 412(b)(1)(C) (exempting "evidence whose exclusion would violate the defendant's constitutional rights" from prohibition).



Julia Simon-Kerr  
*Evangeline Starr Professor of Law*

April 11, 2024

Dear Advisory Committee Members,

The Coalition for Prior Conviction Impeachment Reform (the “Coalition”) is a group of 11 law professors,<sup>1</sup> each of whom has written about prior conviction impeachment. The Coalition formed in 2021 and has since focused its efforts at the state level, filing amicus briefs in cases challenging state equivalents to Federal Rule of Evidence 609 in Oregon and Washington. Two Coalition members authored a report on the need for prior conviction reform in association with the National Association of Criminal Defense Lawyers.<sup>2</sup> Another Coalition member, Professor Bellin, recently presented on the issue to your Committee. We were delighted to learn that possible reform of Rule 609 is on the Committee’s agenda, and we felt compelled to write briefly to you to express support for the Committee’s putting forward a rule change proposal that would allow for notice and comment on this issue.

Each of us has approached this topic from a different scholarly angle, and we differ in the solutions that we would view as ideal. But we are united in viewing the reform proposed in the Reporter’s memo as a vast improvement on the status quo, and in our request that the Committee open this topic up for public comment. While we have collectively written hundreds of pages on this issue, we will flag just three of the factors that make this an urgent topic for public debate:

- **Racial bias.** Prior conviction impeachment is a continuation of policies that barred witnesses from testifying in courtrooms in the United States based on racism, sexism, classism, and other forms of bigotry.<sup>3</sup> Although these patently unconstitutional witness competency laws are gone, impeachment with prior convictions still functions systematically to exclude and silence witnesses with prior convictions who—due to racial disparities at each stage of criminal proceedings—are disproportionately witnesses of color. Rule 609 stands not as a testament to hard-fought Congressional compromise, but as the continuation of a historical view that certain witnesses were not worthy of belief.<sup>4</sup> The rule itself was the product of a racially charged Congressional debate in which the “stereotype of the Black criminal” played a central

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<sup>1</sup> Professors Jeffrey Bellin (William and Mary Law School), John Blume (Cornell Law School), Bennett Capers (Fordham University School of Law), Montré Carodine (University of Alabama School of Law), Jasmine Gonzales Rose (Boston University School of Law), Lisa Kern Griffin (Duke University School of Law), John D. King (Rutgers Law School), Colin Miller (University of South Carolina School of Law), Aviva Orenstein (Indiana University Maurer School of Law), Anna Roberts (Brooklyn Law School), and Julia Simon-Kerr (The University of Connecticut School of Law).

<sup>2</sup> Anna Roberts & Julia Simon-Kerr, PRIOR CONVICTION IMPEACHMENT: THE NEED FOR REFORM, <https://strengthenthesixth.org/focus/PRIOR-CONVICTION-IMPEACHMENT-THE-NEED-FOR-REFORM>.

<sup>3</sup> See Julia Simon-Kerr, *Credibility by Proxy*, 85 Geo. Wash. L. Rev. 152 (2017).

<sup>4</sup> *Id.*

role.<sup>5</sup> Today, as discussed below, Rule 609 functions in large part as a witness silencing mechanism, and the witnesses it silences are disproportionately people of color.

- **Constitutional implications.** The threat of prior conviction impeachment chills the exercise of the constitutional right to testify in one’s defense. Studies of wrongful convictions and first-hand accounts offered by exonerees who chose not to testify at their trials describe the decision as motivated by a well-founded fear of being branded in the eyes of the jury by their prior convictions.<sup>6</sup> Prior conviction impeachment has also encouraged those facing criminal charges—including those subsequently exonerated—to waive the right to trial and take a guilty plea.<sup>7</sup> Concern for protecting the constitutional right to testify caused the Hawai’i Supreme Court to bar prior conviction impeachment of those facing criminal charges.<sup>8</sup> Relatedly, many evidentiary rules and precepts assume the existence of a meaningful—and vital—opportunity for those facing criminal charges to testify.<sup>9</sup> Evidence rules also favor live testimony of witnesses where possible. By silencing many defendants in criminal cases and imposing a penalty on non-party witnesses who must face questioning about unrelated prior convictions when performing their civic duty and testifying in court, Rule 609 stands in tension with these precepts.
- **Lack of empirical basis.** Prior convictions are not a tested metric of untruthfulness. Instead, they have long signified which witnesses are deemed unworthy of being heard or believed. Yet, being unworthy of belief in the eyes of those in power is not the same as being dishonest. Fifty years after the enactment of Rule 609, it is clear that the only permitted use of convictions under Rule 609, namely to shed light on a witness’s “character for truthfulness,” is not supported by social science data.<sup>10</sup> To the contrary, the best empirical study on the effect of prior conviction impeachment found that “determinations of the defendant’s credibility

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<sup>5</sup> Montré Carodine, *“The Mis-Characterization of the Negro”: A Race Critique of the Prior Conviction Impeachment Rule*, 84 Ind. L.J. 521, 549 (2009) (noting that “one must keep in mind that most people at that time—as is true today—saw a Black face when they thought about the criminal element in society.”).

<sup>6</sup> John Thompson, Opinion, *The Prosecution Rests, but I Can’t*, N.Y. Times (Apr.9,2011), <https://www.nytimes.com/2011/04/10/opinion/10thompson.html> (describing Thompson’s own inability to tell his story at the trial at which he was wrongfully convicted due to a prior conviction); John H. Blume, *The Dilemma of the Criminal Defendant with a Prior Record—Lessons from the Wrongfully Convicted*, 5 J. Empirical Legal Stud. 477, 491 (2008).

<sup>7</sup> Recent appellate litigation in Washington makes this point powerfully. See Brief of Appellant at \*105-07, *State v. Gates*, 2022 WL 2402337 (Wash. Ct. Apps.).

<sup>8</sup> See *State v. Santiago*, 492 P.2d 657, 660-61 (Haw. 1971).

<sup>9</sup> See, e.g., Roger Park, *The Rationale of Personal Admissions*, 21 Ind. L. Rev. 509, 516 (1988) (“It is fair to receive an admission [under Federal Rule of Evidence 801(d)(2)] because ordinarily the party who made the admission will have the opportunity to put himself or herself on the stand to explain the statement or to deny having made it”).

<sup>10</sup> An Oregon Supreme Court Justice recently made that very point in a question to the Government attorney at oral argument. Oral Arg., *State v. Aranda*, Or. Sup. Ct., <https://oregoncourts.mediasite.com/mediasite/Channel/default/watch/94e222ad8fb44fd8bf624fb29d6430fd1d> 8:28- 9:18 (Feb. 1, 2023) (asking the government for its response to data suggesting that convictions offer no probative value on truthfulness).



are not the prime method by which criminal record influences guilt judgments.”<sup>11</sup> Instead, “[t]he evidence against a defendant with a prior record appears stronger to the jury.”<sup>12</sup>

We very much hope that the Committee will put forward a rule change proposal that would allow concerned members of our Coalition, the broader legal academy, the bench, the bar and the public to expand on these points and others during the notice and comment period. In the half century since it was enacted, Rule 609 has proved to be a rule that does little to advance the mission of the Federal Rules, to “ascertain[] the truth and secure[] a just determination.” Instead, it is one key reason that so many trials are conducted without the most critical evidence available, the testimony of the defendant.

Sincerely,

Two handwritten signatures in black ink. The first signature on the left is 'J.S.-K' and the second signature on the right is 'A.R.'

Professors Julia Simon-Kerr & Anna Roberts  
On Behalf of The Coalition for Prior Conviction Impeachment Reform

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<sup>11</sup> Theodore Eisenberg & Valerie P. Hans, *Taking a Stand on Taking the Stand: The Effect of a Prior Criminal Record on the Decision to Testify and on Trial Outcomes*, 94 Cornell L. Rev. 1353, 1359–61 (2009).

<sup>12</sup> *Id.*



## U.S. Department of Justice

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950 Pennsylvania Ave, N.W.  
Washington, D.C. 20530

April 12, 2024

The Honorable Patrick Schiltz  
United States District Judge  
United States Courthouse  
300 South Fourth Street, Room 14E  
Minneapolis, MN 55415

Re: Federal Rule of Evidence 609(a)(1)

Dear Judge Schiltz:

We write in order to articulate the views of the Department of Justice on the current proposal to amend Federal Rule of Evidence (“FRE”) 609 by abrogating subsection 609(a)(1), among other suggestions. For the reasons that follow, we oppose the amendment.

To begin, a jury is entitled to hear relevant evidence, *see* FRE 401, including impeachment evidence. The agenda memorandum (“Memo”) agrees that prior convictions involving dishonesty are relevant in assessing the credibility of a witness testifying under oath at trial. But as the current rule recognizes, there can also be probative value in prior felony convictions even where the elements of those offenses do not expressly involve a dishonest act or false statement—and the rule sensibly requires the district court to find that such probative value outweighs any prejudicial impact to a criminal defendant prior to admission.

Many offenses that do not require proof of a dishonest act or false statement to establish an element of the offense may in fact involve such a dishonest act or false statement. Imagine, for example, two defendants, each of whom lied to the owner of property in order to gain access to that property. The two defendants then took the property away without the owner’s consent, with the intent to deprive the owner of the property. One defendant is charged with larceny, which does not require proof of a false statement, while the other is charged with fraud, which does require proof of a false statement. Without Rule 609(a)(1), the fraud defendant could be impeached with his prior conviction, but the theft defendant could not, even though they engaged in identical conduct.<sup>1</sup> Much like the oft-maligned categorical approach that defines “crimes of violence” only by the elements of the offense as opposed to the actual conduct of the defendant, a bright line rule

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<sup>1</sup> Similarly, obstruction of justice does not require deceit or dishonesty as an element of the offense. Yet obstruction of justice often entails dishonest conduct, such as lying to authorities. Without Rule 609(a)(1), a defendant could be impeached with a conviction for making a materially false statement to an agent or officer, but not if the same conduct was prosecuted as obstruction of justice.

that allows impeachment by prior convictions only by reference to the elements of the offense, and not the conduct of the defendant, makes little sense.

To be sure, if unchecked by judicial oversight, there is risk that impeachment by prior conviction could create unfair prejudice. But the drafters of Rule 609 addressed that concern by carefully crafting the rule to provide additional protections to criminal defendants. For most witnesses, a relevant prior conviction is admissible subject to Rule 403; to be excluded, the probative value must be substantially outweighed by unfair prejudice. But prior convictions of defendants face a much stricter admissibility standard. Those convictions are admissible only if the probative value outweighs any unfair prejudice. The current rule thus strikes the right balance. It allows judges to determine on a case-by-case basis whether a prior conviction is relevant to establishing the witness's character for truthfulness. It protects criminal defendants by excluding any conviction where the probative value is outweighed by—or even in equipoise with—the danger of unfair prejudice. And it places the decision-making in the appropriate place, with the judge trying the case and considering the specific witness's particular prior conviction.

District courts, moreover, do not take lightly the task of determining whether probative value outweighs the prejudice for determining whether to admit a defendant's prior conviction. Often there are multi-factor tests that the court applies. In the Second Circuit, for example, courts look to five distinct factors: (1) the impeachment value of the prior crime; (2) the date of the conviction and the witness's subsequent history (the more recent, the more probative); (3) the similarity between the past crime and the charged crime (the more similar, the greater likelihood of prejudice); (4) the importance of the defendant's testimony; and (5) the centrality of the credibility issue. *United States v. White*, 312 F. Supp. 3d 355, 359 (E.D.N.Y. 2018) (citing cases). The Third Circuit uses a similar, four-factor test, known as the "Bedford factors." *See Gov't of Virgin Islands v. Bedford*, 671 F.2d 758, 761 (3d Cir. 1982); *United States v. Gillard*, 2024 WL 247054 (E.D. Pa.) (Jan. 23, 2024) (denying motion *in limine* to admit prior convictions); *see also United States v. Wilkins*, 538 F. Supp. 3d 49, 84 (D.D.C. 2021) (denying admission of prior conviction applying multifactor test).

To the extent that the Memo argues that some district courts are improperly applying the balancing test required by FRE 609(a)(1)(B) to admit prior convictions that should be excluded, abrogation of the rule itself would be a blunt and heavy-handed solution. At most, concern for how district courts conduct the required balancing would support judicial education on the balancing test, not elimination of the rule. As the cases reflect, however, courts come out on both sides of the balancing test depending on the facts of the individual case. That makes sense, as district courts are in the best position to assess the particular facts of the cases and apply the established legal framework.

We also disagree that the compromise position that Congress reached in Rule 609 is muddled or illogical. On the contrary, it is quite reasonable to conclude that prior convictions involving dishonesty and false statements are extremely probative of credibility for a testifying witness and should always be admitted, but that other felonies, while probative, may be less so and more likely to prejudice a defendant, such that a defendant-friendly balancing test should be applied. The D.C. Circuit, in *United States v. Lipscomb*, 702 F.2d 1049, 1058 (D.C. Cir. 1983), included a long discussion of the legislative history of the Rule, which is based on the rationale

that all felonies are probative of credibility to a greater or lesser degree. The Second Circuit in *Estrada* agreed:

It is implausible that Congress believed that crimes falling on one side of the Rule 609(a) line are so probative of credibility that they should be admitted regardless of prejudice but that crimes falling just on the other side of the line may in some cases not be probative at all. We find equally persuasive the point that more likely, Congress anticipated that crimes of stealth (*e.g.*, smuggling, burglary), while not quite crimes of dishonesty or false statement, do reflect lack of credibility and should be admitted unless significantly prejudicial. We thus find the gradations among Rule 609(a)(1) crimes, in terms of their bearing on truthfulness, to lie at the heart of the Rule 403 analysis that district courts must undertake when determining whether to admit for impeachment purposes evidence of a witness's convictions, including their statutory names, under Rule 609(a)(1).

*United States v. Estrada*, 430 F.3d 606, 618–19 (2d Cir. 2005) (cleaned up).

The more nuanced position adopted by Congress is compelling: crimes demonstrating a lack of integrity, requiring more preparation or planning, or indicating a greater disregard for the law are more probative of credibility than those committed on impulse or in the heat of emotion. Abrogating 609(a)(1) would draw an unwarranted bright line rule instead of a fact- and context-specific determination, depriving juries of important and relevant information with which to assess the credibility of testifying witnesses. As the D.C. Circuit wrote in *United States v. Lewis*, when the defendant's testimony conflicts with that of government witnesses, "it is of prime importance that the jury be given as much help in determining credibility as the Rules of Evidence permit." 626 F.2d 940, 950 (D.C. Cir. 1980). Thus, when prior convictions are probative of a defendant's character for truthfulness and willingness to lie under oath, juries should not be denied such information where a determination is made that the probative value outweighs its prejudicial effect.

The Memo expresses appropriate concern about overruling the nuanced, compromise position that Congress reached in Rule 609—but comes to terms with that concern on the basis of two adjustment amendments added to the rule in the 50 years since its promulgation. To state the obvious, there is an enormous difference between adjusting a rule to address particular anomalous applications and throwing that rule out altogether. The former may be necessary to ensure the rule's proper application, but the latter represents a fundamental override of the rule's very purpose—an action that should be taken, in our view, with trepidation and based only on a clear and indisputable empirical and judicial record. Indeed, as recently as 2018, the Advisory Committee rejected a similar proposal to abrogate 609(a)(1) because it ran counter to the hard-fought compromise in Congress that resulted in the passage of Rule 609(a). The Committee at that time also rejected an amendment to account for the self-impeaching nature of a defendant's testimony, and a separate proposed amendment that would have limited felony impeachment to theft-related offenses. *See* [https://www.uscourts.gov/sites/default/files/agenda\\_book\\_advisory\\_committee\\_on\\_rules\\_of\\_evidence\\_-\\_final.pdf](https://www.uscourts.gov/sites/default/files/agenda_book_advisory_committee_on_rules_of_evidence_-_final.pdf).

The Memo also expresses concern that prior convictions similar to the charged offense may be unfairly introduced. That is, of course, an important factor that courts must consider in weighing the probative value against the prejudicial effect. But in certain circumstances, admission of such convictions may be appropriate. Some courts have admitted evidence of prior convictions involving conduct similar to that charged because it was specifically relevant to the defendant's testimony. In *Lewis*, for example, the defendant testified that he was ignorant of street drug transactions, did not recognize drug dealing when he saw it, and did not recognize the illegal drugs at issue. The court admitted the fact of his prior conviction for drug distribution, finding that it was strongly probative of his credibility as to whether he was unfamiliar with the enterprise of drug dealing.

Further, we are unpersuaded by the rationales underlying the proposal for abrogation. First, the Memo expresses concern that juries are unable to understand a court's instruction that prior convictions offered for impeachment purposes are not being introduced to establish a propensity for criminal behavior. But there are countless other such instructions under the Rules that we presume juries to understand. Pursuant to Rule 404(b), for example, juries are instructed to consider prior bad acts only for purposes permitted under the rule, but not to establish a defendant's propensity to commit a criminal act. Juries are instructed to ignore testimony that they have already heard if an objection to such testimony has been sustained. They are also instructed that criminal defendants are presumed innocent, and that no inference may be drawn from defendants invoking their constitutional right not to testify. Juries are instructed on the law that applies to their findings of fact, instructions that can be lengthy and complex. We cannot assume that juries are incapable of following these instructions, as our system of justice depends on the contrary expectation. And in our experience, jurors conscientiously seek to follow the law and are capable of careful and nuanced analysis in their verdicts.

Second, the Memo expresses concern that admission of prior convictions has a disproportionate effect on criminal defendants because it discourages their testimony. Certainly, for defendants with a prior criminal history, the fear of impeachment by prior conviction can be one factor weighing against a defendant's decision of whether to testify.<sup>2</sup> But there are many reasons that defendants choose not to testify, including the reluctance to be cross-examined, and the fact that defendants have no burden of proof. In criminal tax cases, for example, most defendants have no prior convictions, and most defendants do not testify. The Memo also assumes that justice would be better served if more defendants did testify. That does not seem to us an obvious conclusion. Defendants have a constitutional right not to testify, precisely because it is *not* always better for defendants to testify. If the policy goal of the proposed amendment is to encourage more defendants to testify, there is scant evidence to believe that excluding evidence of

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<sup>2</sup> The survey of public defender offices confirms this truism. The survey does not resolve, however, the degree to which the fear of cross-examination, or simply advice of counsel based on the relative burdens of proof, for example, similarly impacts the decision of whether to testify or plead.

prior convictions will accomplish that objective.<sup>3</sup> It may also be a policy leap beyond what is appropriate for the rules of evidence.

Third, we question the wisdom of abrogating 609(a)(1) based on the assumption that defendants who testify are already impeached by having an incentive to avoid conviction. As an initial matter, that assumption turns on its head the presumption of innocence. A jury may be skeptical of a testifying defendant but may also be *more* inclined to believe a defendant who is presumed innocent and has no burden of proof but who nevertheless takes the stand to tell her story, subjecting herself to cross-examination. Indeed, the Memo cites studies suggesting that juries impermissibly penalize defendants who *don't* take the stand, yet they also assume that defendants who *do* take the stand are already so impeached that prior convictions are unjustly cumulative. In addition, under this theory, all testifying defendants are self-impeached. But not all defendants are equally credible. Surely some testifying defendants – *i.e.*, those defendants who have a relevant and admissible prior conviction under 609(a)(1) – are even less credible. The jury is entitled to that information in assessing the defendant's testimony.

Fourth, we are not persuaded by the studies on which the Memo relies to establish that defendants are primarily dissuaded from testifying by fear of being impeached with prior convictions.<sup>4</sup> These studies do not factor in: (1) whether the convictions at issue would be admissible under Rule 404(b); (2) whether the prior convictions were falsity-based; and (3) the fact that there are many other powerful reasons for a defendant not to testify. In addition, many of the studies are dated and/or were conducted in other countries, with different systems of justice, and involved mock trials. We question whether mock jurors behave as real jurors do when exposed to an actual criminal trial, with the attendant solemnity of a courtroom setting and the gravity of a real person facing a potential loss of liberty. It is also not conclusive that in some studies, mock jurors appeared more likely to convict after learning of a prior conviction. That result may be because the prior conviction bore on the defendant's credibility and the jurors appropriately discounted the testimony. It does not necessarily indicate a problem with the rule.

Finally, because we oppose abrogation of Rule 609(a)(1), we do not address all the permutations in the Memo that might flow from such an action. We do oppose, however, any effort to adopt language stating that “[a] crime containing an element of theft may not be treated as requiring proof or admission of a dishonest act or false statement under this rule.” As discussed above, some theft offenses may contain an implied scienter element that involves dishonesty (or a dishonest act) during the commission of the offense. *See, e.g. United States v. Turley*, 352 U.S. 407, 77 (1957) (discussing the terms used in the National Motor Vehicle Theft Act to denote “embezzlement” and noting “that where a federal criminal statute uses a common

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<sup>3</sup> If, as Prof. Bellin argues, a defendant is impeached as soon as she takes the stand “many orders of magnitude greater” than impeachment with a prior conviction, one can expect the abrogation of 609(a)(1) to have little or no impact on a defendant's choice of whether to testify.

<sup>4</sup> The Memo discusses seven states that, in various forms, disallow the use of non-falsity based prior convictions to impeach a witness—but includes no empirical evidence that in those states defendants are more likely to testify than in the remaining 43 states and the District of Columbia where conviction impeachment is permissible.

law term of established meaning without otherwise defining it, the general practice is to give that term its common-law meaning”).

We look forward to discussing these issues further in our upcoming meeting.

Sincerely yours,



Marshall L. Miller  
Principal Associate Deputy Attorney General

**Rule 609(a)(1)(B) Amendment That Would Add a Reverse-Rule 403 Balancing Test  
April 13, 2024**

**Rule 609. Impeachment by Evidence of a Criminal Conviction**

- (a) **In General.** The following rules apply to attacking a witness's character for truthfulness by evidence of a criminal conviction:
- (1) for a crime that, in the convicting jurisdiction, was punishable by death or by imprisonment for more than one year, the evidence:
    - (A) must be admitted, subject to Rule 403, in a civil case or in a criminal case in which the witness is not a defendant; and
    - (B) must be admitted in a criminal case in which the witness is a defendant, if the probative value of the evidence substantially outweighs its prejudicial effect to that defendant; and
  - (2) for any crime regardless of the punishment, the evidence must be admitted if the court can readily determine that establishing the elements of the crime required proving—or the witness's admitting—a dishonest act or false statement.

**Committee Note**

Rule 609(a)(1)(B) has been amended to provide a more exclusionary balancing test for convictions that do not involve dishonesty or false statement, when they are offered to impeach the character for truthfulness of a testifying defendant in a criminal case. Congress allowed such impeachment with non-falsity-based convictions under Rule 609(a)(1), but imposed important limitations when the witness was the accused, in order to assure that the accused's constitutional right to testify would not be improperly discouraged. Experience has shown that the congressional intent to limit admissibility of such convictions has often not been realized. Moreover, the available empirical evidence indicates that the probative value of convictions that do not involve falsity is often minimal when they are offered as a prediction that the witness will lie on the stand. And the unfair prejudicial effect of such convictions, especially when it is the accused being impeached, can be profound. That threat of unfair prejudice may well result in deterring a defendant in a criminal case from testifying at all. The Committee has determined that a non-falsity-based conviction should not be admissible to impeach a criminal defendant unless its probative value *substantially* outweighs the risk of unfair prejudice to the defendant. The Rule retains automatic admissibility for those convictions that are the most probative, i.e., those that required proof that the witness engaged in a dishonest act or false statement.

The strict balancing test contemplates that it will be generally improper to allow impeachment of an accused with a conviction that is similar to the crime charged, given the obvious prejudicial effect that the defendant will suffer from such a conviction. Courts should also be cognizant that the impeachment value of non-falsity based convictions is diminished when the defendant is already impeached on other grounds. For example, if the defendant has made a prior



inconsistent statement, it would be very unlikely that the probative value of a non-falsity based conviction will substantially outweigh the prejudicial effect to the defendant. Likewise, given the fact that the defendant takes the stand already impeached for having a motive to falsify, the additional probative value of a non-falsity conviction is unlikely to substantially outweigh the prejudicial effect.

While Rule 609 governs evidence of convictions, this amendment also has an impact on admissibility of the bad acts that underlie such convictions. If a conviction is inadmissible under this Rule as amended, it is inappropriate to allow a party to inquire about the bad acts underlying the conviction. Accordingly, Rule 608(b) has been amended to impose a limitation on bad act impeachment that tracks the balancing test of Rule 609(a)(1)(B).

### **Corresponding Amendment to Rule 608(b)**

#### **Rule 608. A Witness's Character for Truthfulness or Untruthfulness**

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#### **(b) Specific Instances of Conduct.**

- (1) General Rule.** Except for a criminal conviction under Rule 609, extrinsic evidence is not admissible to prove specific instances of a witness's conduct in order to attack or support the witness's character for truthfulness. But the court may, on cross-examination, allow them to be inquired into under the following circumstances if they if they are probative of the character for truthfulness or untruthfulness of ~~(1)~~ the witness, or ~~(2)~~ another witness whose character the witness being cross-examined has testified about.
- (2) Defendant in a Criminal Case.** If the witness is the defendant in a criminal case and the specific instance does not involve dishonesty or false statement, it may be inquired only if its probative value substantially outweighs the prejudicial effect to the defendant.
- (3) Privilege Against Self-Incrimination.** By testifying on another matter, a witness does not waive any privilege against self-incrimination for testimony that relates only to the witness's character for truthfulness.

### **Committee Note**

Rule 608(b) has been amended to provide that that when impeaching the character for truthfulness of a defendant in a criminal case, inquiry into a bad act is allowed only if the probative value substantially outweighs the risk of prejudice to the defendant. Rule 609(a)(1)(B) has been amended to limit impeachment of a defendant in a criminal case with convictions that do not require proof of a dishonest act or false statement. The same balancing test—the probative value must substantially outweigh the prejudicial effect—is applied to convictions under Rule

609(a)(1)(B) and bad acts under Rule 608. Rule 608(b) is not an avenue that can be used to evade the limitations on admitting convictions under Rule 609.

The courts have consistently applied Rule 403 to determine whether the bad acts of a witness may be raised to show the witness's character for untruthfulness. This amendment affects that case law in only one respect: impeachment of defendants in a criminal case with bad acts that do not involve dishonesty or false statement is now allowed only if the probative value of the bad act substantially outweighs its prejudicial effect. All other bad act impeachment—including impeachment of a criminal defendant with bad acts that involve dishonesty or false statement—remains governed by Rule 403.