The Superfluous Rules of Evidence

Jeffrey Bellin*

There are few American legal codifications as successful as the Federal Rules of Evidence. But this success masks the project's uncertain beginnings. The drafters of the Federal Rules worried that lawmakers would not adopt the new rules and that judges would not follow them. As a result, they included at least thirty rules of evidence that do not, in fact, alter the admissibility of evidence. Instead, these rules: (1) market the rules project, and (2) guide judges away from anticipated errors in applying the (other) nonsuperfluous rules.

Given the superfluous rules' covert mission, it should not be surprising that the rules' drafters were not transparent about their nature. Instead, the drafters incorporated these rules so seamlessly into the overall project that their evidentiary insignificance goes largely unnoticed. This Essay pulls back the curtain to reveal the superfluous nature of many of the celebrated rules of evidence. The presence of so many superfluous rules says something interesting about the rules project and sheds light on how the evidence rules should be taught, interpreted, and applied.

* Professor, William & Mary Law School. Thanks to Ed Cheng and the *Vanderbilt Law Review* for sponsoring this Symposium and for inviting me to it, and to the participants whose comments greatly improved my contribution.

INTRODUCTION

It is difficult to identify a more successful American legal codification than the Federal Rules of Evidence. The Rules' drafters not only succeeded in creating an entirely new, rule-based federal law of evidence, but their efforts swept the nation. Soon after Congress adopted the Rules in 1975, almost every state followed.[1]

The project's success must be appreciated not just by reference to the Rules' now-dominant position in the American evidence landscape but also in light of the dramatic change they represented. Prior to the codification of the Federal Rules, American jurisdictions relied on a judicial common law of evidence.[2] The Federal Rules put an end to these churning "channels of evidentiary evolution."[3] American courts would no longer craft the rules of evidence opinion by opinion. Instead, judges were instructed to apply a slim pamphlet of

1. Bennett Capers, *Evidence Without Rules*, 94 NOTRE DAME L. REV. 867, 872 (2018) ("[F]orty-five states and Puerto Rico have all adopted or modeled their own rules on the Federal Rules of Evidence.").

2. G. Alexander Nunn, *The Living Rules of Evidence*, 170 U. PA. L. REV. 937, 949 (2022) ("Historically, evidence law was largely a creature of the judiciary. Common law jurisprudence served as the driving force behind evidentiary progression."); Edward W. Cleary, *Preliminary Notes on Reading the Rules of Evidence*, 57 NEB. L. REV. 908, 909 (1978) ("The legal background against which the Rules were drafted and enacted was a vast collection of common law precedents.").

3. *See* Nunn, *supra* note 2, at 950; Cleary, *supra* note 2, at 915 ("In principle, under the Federal Rules no common law of evidence remains."); *see also* Capers, *supra* note 1, at 872 (describing pre-rules common law of evidence as a "hot mess"); *cf.* Justin Sevier, *Evidentiary Trapdoors*, 103 IOWA L. REV. 1155, 1163 (2018) (noting that the "rule makers specifically sought to relax several features of the common law of evidence, including the rules governing competency, impeachment, and hearsay").

prefabricated rules that governed every evidentiary scenario. Further, Congress seized ultimate authority to change federal evidence law going forward.[4] After the enactment of the Federal Rules, new rules could only be adopted directly by Congress or through an Advisory Committee with congressional approval.[5]

At the time of the Rules' adoption, judges were skeptical that a diminutive booklet of federal rules could replace a common law of evidence that occupied "ten volumes of Wigmore" (the era's leading evidence treatise).[6] But the Rules' drafters had a secret weapon. They embraced an elegant philosophy that minimized the need for rules. The key to this philosophy was a permissive standard of relevance that anchored a deceptively simple command: "[a]ll relevant evidence is admissible, except as otherwise provided."[7] Since, as a practical matter, most evidence that a party seeks to offer will be relevant, a judge applying the new rules typically confronted only one question: Did one of the other rules require exclusion? This framework could lead to complex analysis if, for example, relevant evidence appeared to be prohibited by the character or hearsay rules. But that complexity was solely one of application. The All-Relevant-Evidence-is-Admissible-Except ("AREA-Ex") principle[8] created a closed system, eliminating the need for judges to craft new rules. If evidence was relevant and none of the newly codified rules supported exclusion, the evidence must be admitted. Period.

For all their success, the Rules' drafters lacked one thing: confidence. They toiled amidst the wreckage of two previous codification efforts, the Uniform Rules of Evidence and the American Law Institute's Model Code of Evidence, both of which achieved only meager success.[9] The drafters of the Federal Rules could not take their project's success for granted.

---

4. Cleary, *supra* note 2, at 910 ("The most basic and fundamental assumption underlying the Rules is that of congressional supremacy.").

5. *Id.* at 910 & n.5.

6. *Id.* at 908 (quoting Judge Bailey Aldrich).

7. RICHARD D. FRIEDMAN & JOSHUA DEAHL, FEDERAL RULES OF EVIDENCE: TEXT AND HISTORY 60 (2015) (quoting originally enacted rule); *see* discussion *infra* note 20 (discussing subsequent stylistic revisions to the language); FED. R. EVID. 402; FED. R. EVID. 402 advisory committee's note to 1972 proposed rules (describing the rule as "the foundation upon which the structure of admission and exclusion rests").

8. AREA-Ex is an acronym inspired by Area 51, the U.S. Air Force base where they keep space aliens. *See Area 51*, WIKIPEDIA https://en.wikipedia.org/wiki/Area_51#UFO_and_other_conspiracy_theories (last updated Oct. 29, 2023) [https://peradma.cc/PG9U-2SD9].

9. *See* UNIF. R. EVID. (UNIF. L. COMM'N 1953); MODEL CODE OF EVIDENCE (AM. L. INST. 1942), at III, XII; Jeffrey Bellin, *EHearsay*, 98 MINN. L. REV. 7, 30–33 (2013) (summarizing these codification efforts).

To ensure that Congress would adopt the Rules and that judges would follow them, the Advisory Committee that drafted the Federal Rules crafted not just an operating system for the federal courts but also an argument for that system's adoption.[10] That argument was primarily embedded in "Advisory Committee Notes" that accompanied each rule. Beyond these notes, however, the drafters also incorporated their argument into the Rules themselves, in the form of at least thirty rules that did not change the admissibility of any evidence.[11] Instead, these rules comforted legislators, disarmed potential critics, and hedged against judicial intransigence. As a result, many of the federal rules are not rules at all, but marketing pitches and training wheels.

This Essay exposes the thirty superfluous rules: rules that could be removed from the Federal Rules of Evidence without, as a formal matter, altering evidentiary outcomes. I draw on three approaches in the rule-specific sections below to accomplish this task. First, and most importantly, I show that the superfluous rules don't alter the admissibility of evidence (or, in a few cases, alter it so little that the difference is trivial). I do this by pointing out overlap between the targeted rules and other rules. I have already hinted at the most common argument along these lines: Many of the superfluous rules purport to admit evidence, but the genius of the Federal Rules is that they already do that through the AREA-Ex principle articulated in Rule 402. All relevant evidence is admissible unless another rule says otherwise. This framework means that there is no need for other rules that *also* authorize the admission of relevant evidence. The only rules that matter (other than Rule 402) are rules that exclude.

Second, I preempt a common response. Many readers will wonder: If a rule really does nothing, why was it enacted? I resolve this conundrum by pointing to the Rule's drafting history and common-law context. A familiar pattern emerges across many of the rules identified below. For example, Rule 406 informs judges that habit evidence "may be admitted"[12]—language that cannot change any outcome under the Federal Rules, which already admit *all* relevant evidence through Rule 402. Rule 406 exists to highlight the Rules' sensible allowance of habit evidence and to prevent the reemergence of common-law restrictions that judges once placed on that evidence.[13] Thus, rules like Rule 406 don't change evidentiary outcomes. They highlight the wise (and

10. *See* discussion *infra* Part I.

11. Other potentially superfluous rules include Rule 405(b). *See* ROBERT P. MOSTELLER, KENNETH S. BROUN, GEORGE E. DIX, EDWARD J. IMWINKELRIED, DAVID H. KAYE & ELEANOR SWIFT, MCCORMICK ON EVIDENCE § 187 (8th ed. 2020) (describing Rule 405(b) as "logically superfluous").

12. FED. R. EVID. 106.

13. *See* discussion *infra* Part V (analyzing Rule 406).

popular) choices made by the Rules' drafters and give judges a nudge in the right direction as they apply the new rules.

Third, I bring some objective measures to bear. One way to evaluate a rule's utility is to see how often judicial opinions cite it. Many of the rules I deem superfluous are infrequently referenced by judges. For example, state and federal court judges cited Rule 903 (subscribing witnesses) fifty-two times in the past fifty years, barely managing a single citation per year.[14] Especially problematic superfluous rules are not just rarely cited but receive more interest from commentators than judges. To identify rules along these lines, I present a measure of my own creation: the Real-World Ratio ("RWR"). The RWR is the ratio of judicial opinion citations to secondary source citations, like citations in legal treatises and law review articles. As we will see, the RWR tracks my contentions but does not perfectly distinguish the rules that matter from those that are superfluous.

Rules that matter, like Rule 404 (character evidence prohibition), have a high RWR—about 4:1—meaning they are cited four times more often by judges than scholars. Other important rules, like the definitions of relevance (Rule 401) and hearsay (Rule 801) have healthy RWR ratios of around 3:1.[15] By contrast, many of the rules critiqued in the pages that follow have low RWRs. Eight of the rules identified as superfluous have a ratio of less than 1, meaning they are discussed more frequently in secondary sources than in judicial opinions. Rule 102, for example, has a RWR of 0.43, meaning that it is cited more than twice as often by scholars than judges. A low ratio does not, by itself, demonstrate that a rule is superfluous. But it is a sign of superfluity.[16] A low RWR also suggests that a rule is generating more heat than light and, in the case of superfluous rules, illustrates the potential benefits of greater transparency. For example, Rule 106 (RWR of 1.67) has generated abundant heat in the form of a circuit split, numerous law review articles, and a pending amendment—all while having no (formal) impact on the admissibility of evidence.[17] (A table illustrating the relative use of the evidence rules and their RWR is included in the next Part.)

What should be done with the superfluous rules? The first draft of this essay argued for their elimination. My evidence colleagues convinced me that I had gotten carried away for (at least) two reasons. First, it may, in fact, be desirable for the Rules of Evidence to include

14. *See* Table 2 *infra*.
15. *See* Table 1 *infra*.
16. Yes, "superfluity" is actually a word.
17. *See* FED. R. EVID. 106; *infra* Part VIII (analyzing Rule 106).

rules that guide judges toward the answers required by other rules of evidence. Thus, superfluity is not *itself* a sufficient reason to remove a rule. Second, there are more important rule changes to consider. Efforts to cull the superfluous rules would be better redirected toward eliminating rules that are actively impairing the adjudicative process, like Rule 609.[18]

That doesn't mean superfluity is unimportant, however. Recognizing the superfluous nature of many of the rules of evidence will help judges, attorneys, and scholars better understand and apply those rules, as well as the nonsuperfluous rules with which they overlap. This recognition also illuminates the overall project of crafting evidence rules and legal rules more generally. There may be times when superfluous rules are needed, and it may even be necessary to disguise their superfluity. But at this point in the evolution of the Federal Rules of Evidence—the fiftieth anniversary of their adoption by the Supreme Court[19]—transparency is overdue. If superfluous rules are to remain an important feature of American evidence law, we should pull back the curtain and reveal their true nature.

I. THE ORIGIN STORY OF SUPERFLUOUS RULES

In its original incarnation, Rule 402 stated, "All relevant evidence is admissible, except as otherwise provided."[20] This simple AREA-Ex command means that every evidentiary question that comes before a court has an answer that can be found in the Rules. And it leaves a sole constructive purpose to every other federal rule of evidence: identify situations where relevant evidence will be excluded. The best example of such a rule is Rule 403, which states, "The court may exclude relevant evidence if its probative value is substantially

18. *See, e.g.*, Anna Roberts, *Conviction by Prior Impeachment*, 96 B.U. L. REV. 1977, 1978 (2016); Montré D. Carodine, *"The Mis-characterization of the Negro": A Race Critique of the Prior Conviction Impeachment Rule*, 84 IND. L.J. 521, 525 (2009); 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, 327 (2008).

19. The Supreme Court promulgated the rules in an order in November 1972. *See* 56 F.R.D. 183; FRIEDMAN & JDEAHL, *supra* note 7, at xiii-xiv. The rules then went through a lengthy Congressional approval process, finally becoming law in 1975. *Id.*

20. FED. R. EVID. 402; *see* FED. R. EVID. 402 advisory committee's note to 1972 proposed rules (describing the rule as "the foundation upon which the structure of admission and exclusion rests"). The 2011 restyling project restyled Rule 402 which now reads: "Relevant evidence is admissible unless any of the following provides otherwise . . . ." FED. R. EVID. 402. The substance of the rule remained unchanged. *See* FED. R. EVID. 402 advisory committee's note to 2011 amendments ("These changes are intended to be stylistic only. There is no intent to change any result in any ruling on evidence admissibility.").

outweighed by" various dangers, including the danger of unfair prejudice.[21]

The other major exclusionary rules are Rules 404 (character evidence) and 802 (hearsay), which themselves contain subsidiary rules (Rules 405, 608, 609; Rules 801, 803, 804, 807) that limit these broad rules of exclusion.[22] These exclusionary rules and their exceptions form closed subsystems that identify certain relevant evidence as inadmissible character or hearsay evidence, forming the bulk of the operational evidentiary landscape.[23]

Table 1 includes the six evidence rules that do almost all of the evidentiary work.[24] Their productivity is reflected in their high volume of judicial citations and high RWRs.

TABLE 1: PRODUCTIVE EVIDENCE RULES

Rule	Total Case Cites (1975-2022)	Real World Ratio
404 (character evidence)	24,157	4.02
403 (unfair prejudice)	33,973	3.05
401 (relevance definition)	18,016	3.04
402 (relevance principle)	10,846	3.03
801 (hearsay)	26,109	2.68
702 (experts)	35,532	2.48

Each of these nonsuperfluous rules is frequently cited in judicial opinions, far outstripping citations in secondary sources.

In sharp contrast to these rules, there are thirty evidence rules that have no real impact on the admissibility of evidence. These rules typically purport to buttress the admissibility of relevant evidence, offering lukewarm commands like, certain evidence "may be

21. FED R. EVID. 403.

22. *Id.* at 404, 802; *see, e.g.*, *id.* at 803 (identifying evidence that is "not excluded by the rule against hearsay").

23. *See id.* at 404 (providing broad exclusion and then identifying specific exceptions in Rules 405, 608, 609); *see, e.g.*, *id.* at 802 (same with Rules 801, 803, 804, 807). The term "subsystem" is used here to distinguish small, closed loops covering discrete topics (e.g., "hearsay is prohibited except . . . ") from the large, closed loop created by the Federal Rules of Evidence themselves ("relevant evidence is admissible except . . . ").

24. *See* discussion of methodology *infra* note 36.

admitted,"[25] or is "not objectionable,"[26] "a party need not,"[27] everyone is "competent to be a witness,"[28] and "any party … may."[29] This framing reveals superfluity. If the evidence is relevant, Rule 402 already provides for its admission absent a countervailing rule. Thus, the question is not whether some other rule also supports admissibility (X "may be admitted"). The dispositive question is always whether one of the other rules, like Rule 403, 404, or 802, require exclusion—using language like X "is not admissible."

Why do superfluous rules exist? Though the Rules' drafters never answer this question directly, the answers are apparent from context. Some of the rules address topics that evidence commentators and members of Congress thought should be addressed in any respectable compendium of rules.[30] The drafters often justified inclusion of superfluous rules on the ground that similar rules could be found in other evidence codes, like the California Evidence Code or the Uniform Rules of Evidence.[31] Rules governing authentication, habit, and completeness fit this description, seeming to function as part of an effort to sell the Federal Rules of Evidence.[32] These rules did not change any answers. But they did protect the Federal Rules' drafters against criticism that their proposal was insufficiently comprehensive.

Also important, the Rules' drafters could not be sure that judges would embrace or even fully understand the new federal rules. Rules like those governing "hearsay within hearsay" or "the ultimate issue" are best explained on these grounds.[33] The drafters included these rules not because they were necessary or helped sell the rules, but because they helped judges avoid anticipated mistakes in application. These superfluous rules typically targeted common-law evidence rulings that judges might be tempted to continue making but were no longer appropriate under the Federal Rules.[34]

---

25. FED. R. EVID. 406.

26. *Id.* at 704(a).

27. *Id.* at 613.

28. *Id.* at 601.

29. *Id.* at 607.

30. See discussion in rule-specific sections *infra* pp. 111–30.

31. *See, e.g.*, FED. R. EVID. 411 advisory committee's note (justifying the rule's inclusion as follows: "For similar rules see Uniform Rule 54; California Evidence Code § 1155; Kansas Code of Civil Procedure § 60–454; New Jersey Evidence Rule 54.").

32. *See* Parts on each rule, *infra* pp. 111–30.

33. *See* Parts on each rule, *infra* pp. 111–30.

34. *See* Cleary, *supra* note 2, at 915 (citing Rule 402 and the following opinion, which was subsequently withdrawn, as authority for the proposition that "no common law of evidence remains"); United States v. Grajeda, 570 F.2d 872, 874 (9th Cir. 1978) ("We conclude that the courts are not free to establish rules of evidence independent of the Federal Rules."), *vacated*, 587 F.2d 1017 (1978).

There is also a surprising number of rules, like the "best evidence" rule, that do something vanishingly small.[35] And yet, many of these rules are strangely complex, leading to few benefits but significant costs in terms of confusion and incorrect rulings. Again, these rules are typically explained by an effort to cover all the bases one might expect in a comprehensive set of evidence rules or to steer judges to the answer already required by other rules.

Table 2 presents the superfluous rules in order of ascending RWR.[36] An RWR below 1 means that the rule is cited more frequently in secondary sources than in judicial opinions. Rule 903 holds the dubious honor of the lowest RWR (0.25), appearing in four secondary sources for every appearance in a judicial opinion.

TABLE 2: SUPERFLUOUS EVIDENCE RULES

Evidence Rule Number	Total Case Cites (1975-2022)	Real World Ratio
903	52	0.25
102	393	0.43
803(10)	133	0.58
803(7)	138	0.63
612	734	0.77
302	195	0.79
301	957	0.80
101	475	0.97
806	537	1.04

35. *See infra* pp. 112–13 (discussing Rules 1001–1008).

36. *See* explanation of RWR *supra* Part I and Introduction. For standalone rules, I calculated the RWR with the built-in Westlaw citation feature, dividing the number of court citations by the number of secondary source citations. Where only a portion of a rule is of interest, as with Rule 104(b), that feature is not available, so I used a manual search designed to capture all references to the rule as indicated below. For 104(b), I searched the "all state and federal" database for "104(b) /p relevance" and then divided the resulting number of case citations (564) by the number of secondary source cites (529) for a RWR of 1.07. The other searches were: 704(a) /p "ultimate issue" = 1691 case citations and 494 secondary source citations; 803(7) /p hearsay = 138 case citations and 220 secondary source citations; 803(10) /p hearsay = 133 case citations and 228 secondary source citations. The counts were current as of October 2022.

Evidence Rule Number	Total Case Cites (1975-2022)	Real World Ratio
104(b)	564	1.07
601	1068	1.33
607	1015	1.37
613	1377	1.48
411	696	1.56
106	1270	1.67
406	1230	1.73
1002 (1001–1008)	1628	1.83
901	7037	1.91
705	3688	2.02
805	1255	2.08
602	4635	2.78
701	8134	2.87
704(a)	1691	3.42

The citation counts and RWRs of many of these rules illustrate their superfluity and the potential benefits from exposing their true nature.[37]

The next Parts lay out the arguments, rule by rule, that support my accusation of superfluity, beginning with some of the most celebrated evidence rules.

37. Rule 705's numbers are inflated by its superfluous inclusion in a discovery rule that lists all the expert evidence rules that parties must comply with during discovery. *See, e.g.*, Com. Resins Co. v. Carlson, No. 19-cv-616, 2022 WL 2665955, at *3 (N.D. Okla. July 11, 2022) (explaining that FED. R. CIV. P. 26(a)(2) "mandates that 'a party must disclose to the other parties the identity of any witness it may use at trial to present evidence under Federal Rule of Evidence 702, 703, or 705' ").

II. RULE 805 (HEARSAY WITHIN HEARSAY)

Rule 805 is advice disguised as a rule. Admittedly, it is good advice and judges invoke it often, giving the rule an RWR just over 2. The rule states, "Hearsay within hearsay is not excluded by the rule against hearsay if each part of the combined statements conforms with an exception to the rule."[38]

Hearsay is complicated.[39] The Rules' drafters worried that the courts might interpret the new hearsay rules to exclude multilayered hearsay statements, even if every layer was individually admissible. But there is no reason, under the Federal Rules, to prohibit such statements. If an out-of-court statement is relevant and not barred by the hearsay rule, it should be admitted. The drafters recognized this, stating, "On principle it scarcely seems open to doubt that the hearsay rule should not call for exclusion of a hearsay statement which includes a further hearsay statement when both conform to the requirements of a hearsay exception."[40] The Advisory Committee's Reporter made the point more explicitly in comments on draft Rule 805, explaining, "Perhaps the only real question is whether admissibility is not already adequately achieved under the hearsay exceptions, making further treatment as a specific problem superfluous."[41] The Rules' drafters included Rule 805 just to be sure. The Reporter later explained, "[A] rule on the subject would help to avoid misunderstanding and would call attention to the possibilities."[42]

While the Rules' drafters verged on transparency in this example, there is another clear giveaway that Rule 805 does nothing. The rule applies to only one version of the problem the drafters identified: where each layer in a combined statement "conforms with an *exception* to the [hearsay] rule."[43] Exceptions are only one of the ways that out-of-court statements get into evidence. Out-of-court statements that do not fall within the definition of hearsay in Rule 801(a)-(c)—like those offered for something other than the truth of the matter asserted and those that fit the "not hearsay" exemptions in Rule 801(d) (e.g., opposing party statements)—are just as common. Rule 805 captures

38. FED. R. EVID. 805.

39. *See* Charles Alan Wright & Jeffrey Bellin, *The Hearsay Rule and Hearsay Exceptions*, *in* 30B FEDERAL PRACTICE AND PROCEDURE ch. 9A, at iii (2023 ed.) ("Hearsay is commonly viewed as the most difficult topic in the rules of evidence, and one of the most perplexing in all of law.").

40. FED. R. EVID. 805 advisory committee's note to 1972 proposed rules.

41. FRIEDMAN & DEAHL, *supra* note 7, at 434 (quoting the Reporter's Comments to the Second Draft of Rule 805).

42. *Id.*

43. FED. R. EVID. 805 (emphasis added).

neither of those categories. Yet, it is clear that combined statements in which every layer fits in any exempted category—(i) not hearsay per the definition, (ii) not hearsay per Rule 801(d), or (iii) satisfying a hearsay *exception*—are all admissible.[44] Courts have recognized this without controversy since the Rules' adoption, even though Rule 805, by its terms, does not apply.[45] The reason that the courts can seamlessly apply the same principle embodied in Rule 805 outside of the context to which the rule applies is that Rule 805 is superfluous.

III. RULES 1001 TO 1008 (BEST EVIDENCE)

The "best evidence" rule, which spans Rules 1001 to 1008, does something, but that something is so trivial that I think it can fairly be labeled superfluous.[46] Attorneys need to learn the "best evidence" rule so that they can explain to judges why it doesn't apply.

The active ingredient in the federal "best evidence" rule is Rule 1002, which states that to prove the content of a "writing, recording, or photograph" a litigant must introduce the "original."[47] The most obvious applications of the rule involve disputes over documents. For example, imagine *Vanderbilt Law Review* ("*VLR*") gets into a contract dispute after paying $100 million for the construction of a new law review building. The builder sues, claiming that *VLR* agreed to pay $200 million in a written contract. The "best evidence" rule says that the builder has to introduce the contract to prove its content, i.e., what the contract "says." The builder couldn't try to prove the content of the contract with secondary evidence, like testimony about the contract language.[48] Exceptions abound. The rule gives way if the writing, recording, or photograph is "not closely related to a controlling issue."[49] A party can offer a duplicate of the original.[50] Most significantly, parties can offer secondary evidence as long as they have an explanation for the original's absence.[51] The only explanation that does not work is, "I destroyed the original in bad faith."[52]

---

44. Wright & Bellin, *supra* note 39, § 7042 (explaining logic).

45. *Id.* (citing cases where courts have recognized the exception without controversy). Courts apply a similar analysis in applying the Confrontation Clause. *See, e.g.*, Padilla v. Terhune, 309 F.3d 614, 621 (9th Cir. 2002).

46. Paul C. Giannelli, *Best Evidence Rule*, 14 PUB. DEF. REP. 1 (1991).

47. FED. R. EVID. 1002.

48. *See id.*

49. *Id.* at 1004(d).

50. *Id.* at 1003.

51. *Id.* at 1004.

52. *Id.* at 1004(a) ("[A]ll the originals are lost or destroyed, and not by the proponent acting in bad faith . . . .").

In light of these broad exceptions, the "best evidence" rule only excludes evidence in one far-fetched scenario: when a party offers secondary evidence (e.g., testimony) about what is written in a text or portrayed in a picture and declines to introduce the original text or picture because *that party destroyed the original in bad faith*. This is an unlikely strategy for a litigant to adopt since it will inevitably fare poorly with judges and juries. In addition, even without the "best evidence" rule, a claim along these lines would be dismissed well before trial.[53] The Reporter to the Advisory Committee that drafted the Rules anticipated this critique, raising with the committee the question of "whether a Federal set of rules need[s] anything in this area."[54] The Committee said, "Yes," but they could easily have answered, "No."[55]

IV. RULE 411 (INSURANCE)

Rule 411 states, "Evidence that a person was or was not insured against liability is not admissible to prove whether the person acted negligently or otherwise wrongfully . . . ."[56] This rule seems important since it speaks to an important topic, the admissibility of insurance coverage. But the prohibition of insurance evidence in American civil litigation follows from the "collateral source" rule, not Rule 411.[57] The "collateral source" rule requires the culpable party to pay damages regardless of other sources of potential recovery available to the victim.[58] That makes insurance coverage irrelevant in most scenarios. And when insurance coverage is irrelevant, Rule 402 makes it inadmissible without reference to Rule 411.[59]

A textual hint of Rule 411's inconsequence is that it speaks solely to one kind of insurance, "liability insurance."[60] Rule 411 says nothing

53. *See, e.g.*, FED. R. CIV. P. 56(a) ("The court shall grant summary judgment if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law."); *see also* Metal Jeans, Inc. v. Metal Sport, Inc., 987 F.3d 1242, 1245 (9th Cir. 2021) ("[T]he appropriate standard of review of a district court's determination to grant summary judgment on the affirmative defense of unclean hands is abuse of discretion.").

54. FRIEDMAN & DEAHL, *supra* note 7, at 475 (quoting Cleary).

55. *Id.*

56. FED. R. EVID. 411.

57. *See* Davis v. Odeco, Inc., 18 F.3d 1237, 1243 (5th Cir. 1994) ("The collateral source rule is a substantive rule of law that bars a tortfeasor from reducing the quantum of damages owed to a plaintiff by the amount of recovery the plaintiff receives from other sources of compensation that are independent of (or collateral to) the tortfeasor.").

58. *Id.*

59. *See* FED. R. EVID. 402 ("Irrelevant evidence is not admissible."); Soper v. Sidney Mfg., 95 F.3d 52, No. 95-50834, 1996 WL 459950, at *2 (5th Cir. July 25, 1996) ("The parties agree that Texas's collateral source doctrine made the fact that plaintiffs received workers compensation benefits irrelevant to the issues of damages and right to recover.").

60. FED. R. EVID. 411.

about other common forms of insurance, like medical and life insurance.[61] Does that mean that evidence regarding these other forms of insurance is admissible? No.[62] The "collateral source" rule typically makes that evidence irrelevant.[63] And even when such evidence has some conceivable relevance, the danger of unfair prejudice (an unsupported verdict against the party with insurance) is often substantial. This evidentiary calculation is completely covered by Rules 401–402 (relevance) and 403 (unfair prejudice). Rule 411 plays no part.

Rule 411 only blocks a narrow pathway of admissibility: offering evidence that someone has *liability* insurance to suggest culpability (the rule permits offering evidence of liability insurance for "another purpose").[64] And that prohibition only matters to the extent such evidence wouldn't already be excluded by Rules 402 and 403. That leaves a tiny slice because the relevance argument prohibited by Rule 411 depends on outdated perceptions about insurance.[65] There was (apparently) a time when purchasing liability insurance was suspicious. A jury might be inclined to think that those who purchased such insurance did so to free themselves to act unlawfully.[66] Thus, if two people were eccentric (and rich) enough to own cars in 1940, the individual who purchased liability insurance might be more likely to cause an accident—this driver would be thinking, "I can engage in dangerous driving because I am insured against liability!" Such logic made little sense at the time the rules were drafted[67] and makes even less sense today when companies, homeowners, renters, and drivers are typically obligated to buy insurance, and those who voluntarily purchase insurance are no longer viewed with suspicion.

Like the "best evidence" rule, then, Rule 411 does prohibit something. It prohibits a litigant from introducing evidence that an individual possessed liability insurance to show that the individual is more likely to have acted culpably.[68] But the relevance of that argument

---

61. *See, e.g.*, Cervantes v. Rijlaarsdam, 949 P.2d 56, 58 (Ariz. Ct. App. 1997) ("Evidence Rule 411 specifically applies to 'insurance against liability' and does not mention health insurance . . . .").

62. *See* 2 SUMNER H. LIPMAN & WILLIAM J. MILLIKEN, LITIGATING TORT CASES § 22:47 (2022) ("Evidence of a collateral source for payment of medical bills, that is a payor other than the plaintiff or the defendant, is traditionally not admissible unless specifically allowed by statute or rule.").

63. *Id.*

64. FED. R. EVID. 411.

65. *See id.* at 402.

66. *Cf.* FED. R. EVID. 411 advisory committee's note to 1972 proposed rules ("The courts have with substantial unanimity rejected evidence of liability insurance for the purpose of proving fault, and absence of liability insurance as proof of lack of fault.").

67. FED. R. EVID. 411 ("At best the inference of fault from the fact of insurance coverage is a tenuous one, as is its converse.").

68. *Id.*

is fleeting in modern society and likely always substantially outweighed by unfair prejudice via Rule 403. Thus, it is difficult to identify a case where Rule 411 excluded evidence that would have been (properly) admitted under the other rules.

V. RULE 406 (HABIT)

Rule 406 states:

> Evidence of a person's habit or an organization's routine practice may be admitted to prove that on a particular occasion the person or organization acted in accordance with the habit or routine practice. The court may admit this evidence regardless of whether it is corroborated or whether there was an eyewitness.[69]

The rule's structure oozes superfluity. The rule identifies certain evidence that "may be admitted."[70] But there is no need to tell judges that evidence "may be admitted," as Rule 402 already has that covered. Rule 402 says that *all* evidence may be admitted so long as it is relevant.[71] Evidence of a person's habit or an organization's routine practice will often be relevant. Rule 406 adds nothing when it declares that such evidence "may be admitted."

To illustrate Rule 406's superfluity, consider the classic example of habit evidence: seatbelt use. In a traffic fatality case, testimony that the deceased always used a seatbelt when driving is clearly admissible under the Federal Rules.[72] It is relevant and no other rules command that it be excluded.

Why, then, did the drafters include Rule 406? As indicated in the Advisory Committee Note, the drafters worried that courts might exclude such evidence in two ways.[73] First, judges might consider habit evidence to be prohibited by the character evidence prohibition in Rule 404.[74] By enacting Rule 406, the drafters reminded judges that while "[c]haracter and habit are close akin," there is a distinction between the two.[75] Importantly for the superfluity argument, however, Rule 406 does not itself draw that distinction. It just tells judges to find it—something they already had to do under Rule 404. The rules leave it to the courts to discern whether an unbroken pattern of seatbelt wearing is relevant only through proving a "character trait." I think the answer

69. *Id.* at 406.

70. *See id.*

71. *See id.* at 402.

72. *See, e.g.*, Babcock v. Gen. Motors Corp., 299 F.3d 60, 66 (1st Cir. 2002) (approving admission of such evidence).

73. *See* FED. R. EVID. 406 advisory committee's note to 1972 proposed rules.

74. *See id.*

75. *Id.*

is clear. Testimony about seatbelt wearing, like evidence of other habits, is not barred by Rule 404—but this is a conclusion courts can reach (or not) without help from Rule 406.[76]

Second, the drafters worried that courts might look skeptically on habit evidence, excluding it unless it was corroborated by physical evidence or an eyewitness—requirements that had sometimes been applied under the common law.[77] Judicially created barriers to relevant evidence violate Rule 402, however, and would therefore be inappropriate even without Rule 406.[78]

The drafters included Rule 406 to remind judges that habit evidence was different from character evidence (so not excluded by Rule 404) and should be treated like any other evidence (admitted if relevant per Rule 402). Consequently, Rule 406 is superfluous advice about how to apply the other rules.

VI. RULE 901 (AUTHENTICATION)

Readers may be surprised to find Rule 901, the rule governing authentication, on a list of superfluous rules. The operative part of the rule, Rule 901(a), states, "To satisfy the requirement of authenticating or identifying an item of evidence, the proponent must produce evidence sufficient to support a finding that the item is what the proponent claims it is."[79]

As the Rules' drafters recognized, authentication "represent[s] a special aspect of relevancy."[80] In fact, everything that authentication does is readily handled by the relevance rules.[81] For example, if a knife is introduced in a murder case, it is relevant and thus admissible as long as there is evidence, such as a police officer's testimony, that connects the knife to the crime scene.

Rule 901 adds nothing to the relevance analysis set out above. In every scenario where authentication plays a role, a party is offering

---

76. *See Babcock*, 299 F.3d at 66 (seatbelt use admissible and not character evidence).

77. *See* FED. R. EVID. 406 advisory committee's note to 1972 proposed rules.

78. *See* Wright & Bellin, *supra* note 39, § 6702 (explaining that under the Federal Rules, "[T]he courts' role is to strive, at least, to interpret the rules, not remake them unilaterally"); *cf.* Ethan J. Leib, *Are the Federal Rules of Evidence Unconstitutional?*, 71 AM. U. L. REV. 911, 918 (2022) (noting the fragile constitutionality of even amendments to the congressionally enacted rules of evidence).

79. FED. R. EVID. 901(a).

80. FED. R. EVID. 901 advisory committee's note to 1972 proposed rules.

81. *See* People v. Goldsmith, 326 P.3d 239, 245 (Cal. 2014) ("Authentication is essentially a subset of relevance."); *cf.* Andrea Roth, *Machine Testimony*, 126 YALE L.J. 1972, 1981 n.41 (2017) ("Authentication rules, by requiring proof that an item is what it purports to be, seek to ensure an item's *relevance*, not its *reliability*.").

some evidence based on a claim as to the nature of that evidence.[82] If the claim is correct, the evidence is "authentic" and, typically, relevant.[83] If the claim is incorrect, the evidence is not authentic and, typically, not relevant. This analysis is predominantly factual (not legal),[84] and admissibility ultimately turns on the item's relevance (not whether it is what the proponent claims). Is there sufficient evidence that the knife is from the murder scene (and thus relevant) and not the prosecutor's kitchen drawer (and thus irrelevant)?[85]

Authentication objections can and should be resolved through the relevance rules. If the knife is connected to the crime through testimony or other evidence, the jury should see it. The knife becomes relevant and admissible. If it is not, the knife is a prop—irrelevant, inadmissible, and a waste of everyone's time. Placing an authenticity gloss on top of the relevance inquiry adds nothing new.

The California Evidence Code, the Uniform Rules of Evidence, and the ALI's Model Code all had rules governing authentication, but each was limited to writings.[86] When the drafters proposed the Federal Rules in the 1970s, a broad authentication rule helped sell the project by demonstrating its comprehensiveness. Yet the limited scope of the rules the drafters drew from hints at the rule's superfluous nature.

The ten authentication "examples" in Rule 901(b)[87] illustrate another type of superfluity: judicial training wheels. Rule 901(b) stresses that these are "examples only."[88] The Advisory Committee adds that these "illustrative examples" drawn from case law are intended "to guide and suggest."[89] Examples are important, of course, especially for people learning a new skill. But, especially at this point, there are lots of examples for judges in search of them. We call that case law. And to the extent judges go looking for examples, they would be better served looking at modern cases, not Rule 901(b)'s circa 1970s illustrations.

---

82. *See* FED. R. EVID. 901(a).

83. *See* United States v. Vayner, 769 F.3d 125, 129 (2d Cir. 2014) (explaining authentication).

84. *See, e.g.*, United States v. Sliker, 751 F.2d 477, 497 (2d Cir. 1984) ("[W]hether a given piece of evidence is authentic is itself a question of fact.").

85. *Id.*; *see, e.g.*, State v. Smith, 192 So. 3d 836, 839 (La. Ct. App. 2016) (examining facts to determine whether there was sufficient evidence to show that a text message was authored by the defendant, and thus relevant to assault prosecution); United States v. Vidacak, 553 F.3d 344, 350 (4th Cir. 2009) ("[T]he issue of authenticity is very fact-specific . . . .").

86. CAL. EVID. CODE §§ 1400-1402 (1965); UNIF. R. EVID. 67 (UNIF. L. COMM'N 1953); MODEL CODE OF EVID. 601 (AM. L. INST. 1942).

87. *See* FED. R. EVID. 901(b) ("Examples. The following are examples only—not a complete list—of evidence that satisfies the requirement . . . .").

88. *Id.*

89. FED. R. EVID. 901(b) advisory committee's note to 1972 proposed rules.

VII. RULE 104(B) (CONDITIONAL RELEVANCE)

Ignored by litigators and reviled by law students, Rule 104(b) is superfluous. The rule states, "When the relevance of evidence depends on whether a fact exists, proof must be introduced sufficient to support a finding that the fact does exist."[90]

Unlike the other rules highlighted in this Essay, Rule 104(b) has long been in the crosshairs of evidence scholars who contend that it has "done more harm than good to the body of the law of evidence."[91]

Rule 104(b) creates a slightly higher hurdle for the admission of evidence whose relevance "depends on whether a fact exists," than for evidence whose relevance is challenged more generally under Rule 401.[92] Since both the conditional relevance and relevance hurdles are imprecise, however, pegging one slightly higher than the other achieves little in the real world. This is especially true because litigants don't seem to invoke (or understand) the rule.[93] The rule's low RWR (1.07) suggests it is just as frequently the subject of academic commentary as judicial rulings. Finally, the rule's invocation is largely arbitrary. As scholars have noted, the relevance of every piece of evidence depends on "whether a fact exists."[94] For example, even the most obviously relevant evidence—say, a witness's testimony that the defendant shot the victim—is only relevant if certain facts "exist": e.g., the witness saw what transpired, the witness isn't misremembering, and so on. Since every relevance question could similarly be framed as one of conditional relevance, the dichotomy generated by the rule (regular vs. conditional relevance) is not just illusory but arbitrary.[95]

---

90. FED R. EVID. 104(b).

91. Vaughn C. Ball, *The Myth of Conditional Relevancy*, 14 GA. L. REV. 435, 437–38 (1980); *see also* Ronald J. Allen, *The Myth of Conditional Relevancy*, 25 LOY. L.A. L. REV. 871, 871–72 (1992) (echoing and supplementing Ball's criticisms and using the same title); Craig R. Callen, *Rationality and Relevancy: Conditional Relevancy and Constrained Resources*, 2003 MICH. ST. L. REV. 1243, 1244, 1248 (criticizing the doctrine of conditional relevance on several grounds, including that it is indistinct from general relevance); Dale A. Nance, *Conditional Relevance Reinterpreted*, 70 B.U. L. REV. 447, 506 (1990) (recognizing validity of criticisms of conditional relevance).

92. *See* FED. R. EVID. 401 (setting forth generally applicable standard for relevance).

93. *See, e.g.*, United States v. Snyder, 789 F. App'x 501, 512 (6th Cir. 2019) ("Though the parties do not explicitly frame it this way, this case raises the 'abstruse' concept of conditional relevance."); United States v. Coplan, 703 F.3d 46, 81 (2d Cir. 2012) (highlighting "the Government's apparent failure to confront the Rule 104(b) analysis on appeal"); Cox v. State, 696 N.E.2d 853, 861 (Ind. 1998) ("The admissibility of Puckett's testimony is governed by Indiana Evidence Rule 104(b), 'Relevancy Conditioned on Fact,' although neither party cites this rule.").

94. FED. R. EVID. 104(b); *see* sources cited *supra* note 91.

95. *See* Jeffrey Bellin, *Is Punishment Relevant After All? A Prescription for Informing Juries of the Consequences of Conviction*, 90 B.U. L. REV. 2223, 2254–55 (2010) (reviewing scholarship

Why do we have Rule 104(b)? The rule is a reaction to common-law rulings that created a high bar to evidence whose relevance depended on a fact, as illustrated in the once-famous 1914 Supreme Court case, *Gila Valley, Globe & Northern Railway Co. v. Hall*.[96] The Federal Rules of Evidence sought to eliminate the common law's strict regulation of such evidence with Rule 104(b).[97] They did not need to. The Rules eliminated the common law's stingy treatment of conditionally relevant evidence by adopting a permissive relevance standard (Rule 401) and declining to place any limits on that standard along the lines of those articulated in *Gila Valley*.[98]

VIII. RULE 106 (COMPLETENESS)

Rule 106, "an expression of the rule of completeness,"[99] may be the superfluous rule that has caused the most trouble.[100] It states, "If a party introduces all or part of a writing or recorded statement, an adverse party may require the introduction, at that time, of any other part—or any other writing or recorded statement—that in fairness ought to be considered at the same time."[101]

The reason for all the consternation is that there are two ways to interpret the rule. The modest interpretation permits a party to interrupt the opponent's incomplete presentation of a "writing or recorded statement" and "at the same time" show the jury the rest of the statement. The more robust interpretation of Rule 106 (purportedly) alters the admissibility (not just the timing) of that evidence by permitting the introduction of otherwise inadmissible

---

and explaining that "[t]he consensus view is that all questions of relevance, whether labeled 'conditional' or not, should be analyzed under the general relevance test of Rule 401").

96. 232 U.S. 94 (1914); *cf.* Nance, *supra* note 91, at 467 (discussing the significance of the case).

97. FED. R. EVID. 104(b) advisory committee's note to 1972 proposed rules.

98. *Compare* FED. R. EVID. 401 (treating evidence as "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"), *and id.* at 402 (treating relevant evidence as admissible subject to any restrictions under the United States Constitution, federal statutes, the Federal Rules of Evidence, or other rules as prescribed by the Supreme Court), *with Gila Valley*, 232 U.S. at 103 ("Questions of the admissibility of evidence are for the determination of the court; and this is so whether its admission depends upon matter of law or upon matter of fact.").

99. FED. R. EVID. 106 advisory committee's note to 1972 proposed rules.

100. *See* Daniel J. Capra & Liesa L. Richter, *Evidentiary Irony and the Incomplete Rule of Completeness: A Proposal to Amend Federal Rule of Evidence 106*, 105 MINN. L. REV. 901, 902 (2020) ("[I]nconsistent and unfair application of Rule 106 has plagued the Rule since its adoption in 1975 . . . ."); Harold F. Baker, *Completing the Rule of Completeness: Amending Rule 106 of the Federal Rules of Evidence*, 51 CREIGHTON L. REV. 281, 284 (2018) ("Today there are three different interpretations across the circuit courts, and the United States Supreme Court has yet to provide any substantive guidance." (footnote omitted)).

101. FED. R. EVID. 106.

portions of such a statement "that in fairness ought to be considered."[102] These disparate readings generate a real-looking but artificial circuit split.[103]

That's not all Rule 106 has going on. The rule's limitation to written or recorded statements has led to a recent effort to amend it to include oral statements.[104] All of this could have been avoided with a transparent acknowledgment of the rule's superfluity.

A strong hint at the vacuous nature of Rule 106 is that the case law already includes regular applications of its completeness principle to oral statements, despite Rule 106's inapplicability.[105] Once again, AREA-Ex is all that is needed.[106] When one party introduces parts of a written, recorded, *or* oral statement, a question arises as to whether other parts of that statement might be informative. An application of Rule 401 (relevance) resolves that question.[107] A partial, misleading introduction of a statement renders the balance of that statement relevant to clarifying any resulting confusion.

Consider a hypothetical murder trial where the prosecution introduces a portion of the defendant's statement to police, "I shot him," but the full statement was "I shot him *a dirty look*." Rule 106 suggests two possible responses to this scenario. First, it authorizes the trial court to allow the introduction of the rest of the statement "at the same time." But that can easily be accomplished through principles of judicial control of witness examinations (see Rule 611(a))[108] and cross-examination ("wasn't the full statement, 'a dirty look' "?).[109] Second,

---

102. *Id.*; *see* Wright & Bellin, *supra* note 39, § 6793 (explaining distinction and citing representative cases).

103. *See* sources cited *supra* note 100. For an articulation of the rule that applies uniformly across circuits and illustrates the illusory nature of the circuit split, see United States v. Castro, 813 F.2d 571, 575–76 (2d Cir. 1987) ("Under this rule, the omitted portion of a statement must be placed in evidence if necessary to explain the admitted portion, to place the admitted portion in context, to avoid misleading the jury, or to ensure fair and impartial understanding of the admitted portion.").

104. *See Castro*, 813 F.2d at 576 ("Rule 106 governs only writings . . . ."); *Proposed Amendments to the Federal Rules of Appellate, Bankruptcy, Civil, and Criminal Procedure, and the Federal Rules of Evidence*, COMM. ON RULES OF PRAC. & PROC. OF THE JUD. CONF. OF THE U.S. 294 (2021), https://www.regulations.gov/document/USC-RULES-EV-2021-0005-0001 [https://perma.cc/K498-PCXM] ("After much discussion and consideration, the Committee has unanimously approved, for release for public comment, an amendment to Rule 106 . . . .").

105. *See, e.g.*, *Castro*, 813 F.2d at 576–77 (applying principle to oral statement).

106. *See supra* notes 7–8 and accompanying text.

107. FED. R. EVID. 401.

108. *Id.* at 611(a) ("The court should exercise reasonable control over the mode and order of examining witnesses and presenting evidence so as to: (1) make those procedures effective for determining the truth . . . .").

109. *See id.* at 611 (granting court authority to exercise "control over the mode" of "examining witnesses and presenting evidence," including authorizing "leading questions . . . on cross-examination").

Rule 106 might help to overcome any admissibility problems created by the hearsay rules. As in the example above, the prosecution can admit a defendant's statements under the party opponent exception to the hearsay prohibition.[110] The defense does not have the same option.[111] Yet the hearsay definition resolves that problem without Rule 106's help.[112] The defense can introduce the "dirty look" portion of the statement for something other than the truth of the matter asserted.[113] There is no hearsay problem and no exception required because that portion of the statement becomes relevant as context—illuminating the meaning of the first part.[114]

In sum, a judge can admit the portion of an incomplete or misleading presentation through Rule 611, the relevance rule, and the hearsay definition.[115] While it has managed to kick up great clouds of dust across the evidentiary landscape, Rule 106 is superfluous.

IX. RULE 601 (COMPETENCY)

Rule 601 states, "Every person is competent to be a witness unless these rules provide otherwise."[116]

The rule responds to the once prevalent set of common-law competency rules that "excluded spouses of parties, persons with financial interest in the case, convicted felons, irreligious persons, and various other classes of people" from testifying.[117] But under the Federal Rules, all relevant evidence is admissible. Consequently, any person with knowledge of relevant events can testify, so long as no other rule prohibits it. And since no federal rule excludes testimony on the

110. *See id.* at 801(d)(2) (allowing the introduction of a statement if "[t]he statement is offered against an opposing party and: (A) was made by the party in an individual or representative capacity").

111. Wright & Bellin, *supra* note 39, § 6772 ("[A] party cannot introduce its own statements, or those of its own employee, conspirator, agent, and so on, under Rule 801(d)(2).").

112. FED. R. EVID. 801(a)-(c) (defining hearsay as an out-of-court statement offered to prove the truth of the matter asserted).

113. Wright & Bellin, *supra* note 39, § 6721 (explaining that "[o]therwise inadmissible out-of-court statements can be admitted for the non-hearsay purpose of providing context to other, admissible statements" and providing case citations).

114. *Id.*

115. *See supra* notes 107–114 and accompanying text.

116. FED. R. EVID. 601.

117. George Fisher, *The Jury's Rise As Lie Detector*, 107 YALE L.J. 575, 624 (1997); *see also* Julia Simon-Kerr, *Credibility by Proxy*, 85 GEO. WASH. L. REV. 152, 161 (2017) ("Our modern system of credibility proxies dates back to witness competency rules that evolved in England in the sixteenth and seventeenth centuries . . . ."). The Advisory Committee Note to Rule 601 describes the rule as a "general ground-clearing." FED. R. EVID. 601 advisory committee's note to 1972 proposed rules.

basis of competency, judges can readily resolve competency objections without reference to Rule 601.[118]

X. RULE 602 (PERSONAL KNOWLEDGE)

Rule 602 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."[119]

To understand this rule, one must contemplate situations where it could matter, i.e., scenarios where a witness might testify without personal knowledge. One variant of these scenarios includes witnesses who candidly acknowledge that they are fabricating their testimony. Another variant includes witnesses who testify based on what they think happened, i.e., speculation. In both scenarios, these witnesses would essentially be spinning fictional tales about the case rather than reporting what they perceived. Presumably, such testimony would carry little weight with the jury, serving only to embarrass the party who called the witness and potentially triggering a perjury prosecution. To the extent that the evidence rules have a place here, the relevance rule is all that is needed. Made-up testimony and speculation are not relevant and so are inadmissible under Rule 402—with an assist, if necessary, from Rule 403.[120]

The other possible scenario where a witness might testify without personal knowledge includes witnesses who testified based on what they had been told by someone else. This testimony would certainly be problematic. But this scenario is handled by Rule 802, which prohibits hearsay.[121]

---

118. Rule 606 is a kind of competency rule, stating: "A juror may not testify as a witness before the other jurors at the trial." FED. R. EVID. 606(a). But even that Rule accomplishes its mission without any assistance from Rule 601.

119. *Id.* at 602.

120. *See id.* (generally requiring relevance); *id.* at 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."); *see also* FED. R. EVID. 602 advisory committee's note to 1972 proposed rules (recognizing connection to relevance: "It will be observed that the rule is in fact a specialized application of the provisions of Rule 104(b) on conditional relevancy.").

121. FED. R. EVID. 802; *cf.* FED. R. EVID. 602 advisory committee's note to 1972 proposed rules ("This rule would . . . prevent [a witness] from testifying to the subject matter of the hearsay statement, as he has no personal knowledge of it.").

XI. RULE 607 (ATTACKING ONE'S OWN WITNESSES)

Rule 607 states, "Any party, including the party that called the witness, may attack the witness's credibility."[122]

The drafters explained that they included this rule to eliminate "[t]he traditional rule against impeaching one's own witness."[123] Once upon a time, courts would not permit parties to undermine the credibility of their own witnesses, although the common-law rule was peppered with exceptions.[124]

The drafters of the Federal Rules wisely abandoned this leaky prohibition. They did so by (1) declaring in Rule 402 that all relevant evidence was admissible unless the rules provided otherwise, and (2) declining to include any rules restricting credibility attacks on witnesses called by the attacking party. Consequently, own-witness impeachment is permitted under the Federal Rules even without Rule 607.

XII. RULE 701 (LAY OPINION)

Rule 701 governs witnesses who, while not testifying as experts, offer "testimony in the form of an opinion."[125] The rule requires that the testimony be (a) "rationally based on the witness's perception," (b) "helpful," and (c) "not based on scientific, technical, or other specialized knowledge within the scope of Rule 702."[126]

A close look at each of these provisions reveals how little the rule actually does. Subsection (a) overlaps with Rule 602's requirement of "personal knowledge" (which we don't need anyway).[127] Subsection (b) overlaps with the general requirement of relevance, perhaps with a dollop of Rule 403.[128] And subsection (c) is a reminder that anyone testifying based on scientific or technical expertise must proceed through a different rule.[129] Cutting through the fog, then, Rule 701 is

---

122. FED. R. EVID. 607.

123. FED. R. EVID. 607 advisory committee's note to 1972 proposed rules.

124. *See, e.g.*, State v. Adams, 404 N.E.2d 144, 148 (Ohio 1980) (trial court calls witness at the request of the prosecution and allows prosecution to impeach witness).

125. FED. R. EVID. 701.

126. *Id.*

127. *Compare id.* at 701(a) (requiring testimony to be "rationally based on the witness's perception"), *with id.* at 602 (requiring witness to have "personal knowledge of the matter").

128. *See* Jon R. Waltz, *Judicial Discretion in the Admission of Evidence Under the Federal Rules of Evidence*, 79 NW. U. L. REV. 1097, 1115 (1985) (" 'Helpful' may seem a vague guideline but it is probably no more so than the term 'relevant'; it may even qualify as a synonym.").

129. *See* DAVID L. FAIGMAN, EDWARD K. CHENG, JENNIFER L. MNOOKIN, ERIN E. MURPHY, JOSEPH SANDERS & CHRISTOPHER SLOBOGIN, MODERN SCIENTIFIC EVIDENCE: THE LAW AND SCIENCE OF EXPERT TESTIMONY § 1:32 (2022) ("One of the avowed purposes of amended Rule 701

just a grab bag of parts of other rules, adding nothing that is not already required.

Why do we have Rule 701? To stop judges from falling into old habits. Prior to the Federal Rules of Evidence, parties might object that a witness had voiced an opinion when describing someone as "angry" or "drunk" or "acting in self-defense."[130] Much like a treatise or study guide (but not a rule), Rule 701 pulls together guidance from other rules to offer a framework for resolving these types of objections but adds nothing new.[131]

XIII. RULE 704(A) (ULTIMATE ISSUE)

Rule 704(a) addresses the so-called "ultimate issue" prohibition. It states, "An opinion is not objectionable just because it embraces an ultimate issue."[132]

This was useful advice for courts learning to apply the new Federal Rules of Evidence. As the drafters explained, "The older cases often contained strictures against allowing witnesses to express opinions upon ultimate issues, as a particular aspect of the rule against opinions."[133] And those "unduly restrictive"[134] strictures did not survive the adoption of the Federal Rules.

The Advisory Committee Note to Rule 704 claims that the "so-called 'ultimate issue' rule is specifically abolished by the instant rule."[135] But the use of the word "specifically" hints at the drafters' understanding that the rule merely highlights something that had already been accomplished.[136] The Federal Rules abolished the ultimate issue prohibition when they left it out.

Today, if someone objects to relevant testimony on the ground that it embraces the "ultimate issue," a judge will find no answers in Rule 704.[137] Instead, the judge must look to AREA-Ex. Evidence that is relevant and not excluded by any other rule is admissible. That's all

---

was to ensure that unreliable experts—i.e., experts that would be excluded under Rule 702—would not slip into court through Rule 701."); FED. R. EVID. 702 (requiring qualification as an expert for anyone to testify to "scientific, technical, or other specialized knowledge").

130. *See* FED. R. EVID. 701 advisory committee's note to 1972 proposed rules ("Witnesses often find difficulty in expressing themselves in language which is not that of an opinion or conclusion."); Asplundh Mfg. Div. v. Benton Harbor Eng'g, 57 F.3d 1190, 1195 (3d Cir. 1995) ("Rule 701 represents a movement away from the courts' historically skeptical view of lay opinion evidence.").

131. *See supra* notes 125–130 and accompanying text.

132. FED. R. EVID. 704(a).

133. FED. R. EVID. 704(a) advisory committee's note to 1972 proposed rules.

134. *Id.*

135. *Id.*

136. *See id.*

137. *See id.*

judges need to resolve "ultimate issue" objections. Rule 704(a) is the go-to citation for these rulings, as illustrated by its robust RWR (3.42).[138] That doesn't mean the rule does anything, however. The rule is merely a restatement of a conclusion that the other rules command. Testimony regarding an "ultimate issue" would be permitted (or not) to exactly the same degree if Rule 704(a) did not exist.

XIV. RULE 806 (IMPEACHING HEARSAY DECLARANTS)

When a party introduces a hearsay statement through a hearsay exception, the statement becomes equivalent, legally speaking, to live-witness testimony.[139] But the person who made the statement need not testify.[140] This raises the question of whether the party adversely affected by the statement can impeach the credibility of the absent declarant. Rule 806 says yes, permitting a party to attack a hearsay declarant's credibility as "if the declarant had testified as a witness."[141]

Rule 806 is, in essence, an observation of the relevance of certain evidence. But it is not necessary to make that evidence relevant (and admissible). Rule 806's command can be realized solely through the AREA-Ex principle. If a hearsay statement is admitted as substantive evidence (for the truth of the matter asserted), the credibility of the out-of-court speaker, i.e., the hearsay declarant, becomes relevant. Evidence that undermines the declarant's credibility, then, also becomes relevant.[142] And all relevant evidence is admissible.[143]

XV. RULE 612 (REFRESHING WITNESSES)

Rule 612 lays down rules regarding the common practice of refreshing a witness's memory with documents. The rule says that when a witness relies on a document "for the purpose of testifying,"[144]

---

138. *See supra* pp. 107–10.

139. *See* FED. R. EVID. 806 advisory committee's note to 1972 proposed rule.

140. *See id.* at 803 (permitting certain exceptions to the rule prohibiting hearsay statements "regardless of whether the declarant is available as a witness"); *id.* at 804 (providing parameters for permitting hearsay statements of unavailable witnesses).

141. FED. R. EVID. 806.

142. *See* Wright & Bellin, *supra* note 39, § 7051 ("It would be odd, then, not to treat the hearsay declarant in the same manner that she would have been treated had she appeared at trial and testified to the same effect as the hearsay declaration.").

143. FED. R. EVID. 402.

144. This was the language of the rule until the restyling of the rules in 2011. *See* FRIEDMAN & DEAHL, *supra* note 7, at 263 (identifying the restyling change). Since the restyling was not permitted to change the substance of any of the rules, it remains the applicable limit of the rule. *See* FED. R. EVID. 612 advisory committee's note to the 2011 amendments ("These changes are

the adverse party gets to see the document and can, potentially, introduce it into evidence. That makes perfect sense. If a witness uses a document to present testimony to a jury, that document becomes relevant to assessing the witness's testimony and credibility. And when something is relevant, it becomes admissible with or without Rule 612.

The drafters of the Federal Rules claimed that the "bulk of the case law"[145] was not in accord with Rule 612, but by declining to codify that case law, they solved the problem. The use of documents to refresh a witness's memory is a problem that can be resolved through the application of the rules governing relevance and discovery.[146]

XVI. RULE 613(A) (ASKING WITNESSES ABOUT PRIOR STATEMENTS)

Rule 613(a) states, "When examining a witness about the witness's prior statement, a party need not show it or disclose its contents to the witness. But the party must, on request, show it or disclose its contents to an adverse party's attorney."[147]

The rule is a response to an 1820 English decision charmingly referred to as "The Queen's Case." As the Advisory Committee Note to the rule states, "The Queen's Case . . . laid down the requirement that a cross-examiner, prior to questioning the witness about his own prior statement in writing, must first show it to the witness."[148] The drafters explained, "Abolished by statute in the country of its origin, the requirement nevertheless gained currency in the United States."[149] The drafters then proudly state that Rule 613(a) "abolishes this useless impediment[ ]to cross-examination."[150] Great news, but a news bulletin

---

intended to be stylistic only. There is no intent to change any result in any ruling on evidence admissibility.").

145. FED. R. EVID. 612 advisory committee's note to 1972 proposed rules.

146. For a sampling of discovery rules that would be applicable, see FED. R. CIV. P. 26(b)(1) ("Parties may obtain discovery regarding any nonprivileged matter that is relevant to any party's claim or defense . . . ."); 18 U.S.C. § 3500(b):

> After a witness called by the United States has testified on direct examination, the court shall, on motion of the defendant, order the United States to produce any statement (as hereinafter defined) of the witness in the possession of the United States which relates to the subject matter as to which the witness has testified. If the entire contents of any such statement relate to the subject matter of the testimony of the witness, the court shall order it to be delivered directly to the defendant for his examination and use.

147. FED. R. EVID. 613(a). The rule includes some discovery language that is typically viewed as the province of other rules, *see* sources cited *supra* note 129 (regarding the requirement that anyone testifying to scientific, technical, or other specialized knowledge be qualified as an expert), and appears redundant to those rules. Rule 613(b) adds some commentary about extrinsic evidence.

148. FED. R. EVID. 613 advisory committee's note to 1972 proposed rules.

149. *Id.*

150. *Id.*

does not require a rule of evidence. The rule of the Queen's Case did not make it into the Federal Rules of Evidence. That was all it took to depose it.

XVII. RULE 705 (ORDER OF EXPERT TESTIMONY)

Rule 705 tells courts that they need not employ the traditional ordering principle for expert testimony. Once again, the rule announced a change from the common law: "The elimination of the requirement of preliminary disclosure at the trial of underlying facts or data . . . ."[151] And once again, it had no need for doing so. The absence of the common-law rule in the Federal Rules of Evidence eliminated the traditional ordering requirement with or without Rule 705.

XVIII. RULES 301 AND 302 (PRESUMPTIONS)

I have a strong suspicion that Rules 301 and 302 don't do anything. I am open to counterarguments, however, since these provisions are the Federal Rules' only discussion of a classic topic: presumptions.[152] The problem may simply be that these rules are out of place. They aren't really evidence rules (rules concerning the admission and exclusion of evidence). Instead, they are civil procedure rules that got lost. Nevertheless, I suspect that the Federal Rules of Civil Procedure haven't come looking for them because they are superfluous.

Rule 301 sounds especially important: "[T]he party against whom a presumption is directed has the burden of producing evidence to rebut the presumption." Sensible too. But then it is hard to think of how it would be otherwise. That has to be how presumptions work, right? The rule continues by saying, "But this rule does not shift the burden of persuasion, which remains on the party who had it originally." That makes sense too, I guess. But, again, what's the alternative? (Rule 302 then removes this amorphous guidance in favor of any conflicting state law for claims or defenses that turn on state law.) Another aspect of this puzzle (apart from the misplacement of these rules) is the rules' brevity. It appears that the rules' drafters intended to say a lot more, but Congress preferred the bare-bones language that was ultimately enacted.[153]

---

151. FED. R. EVID. 705 advisory committee's note to 1972 proposed rules.

152. The Uniform Rules had four presumption rules, including an extensive treatment in Rule 14. *See* UNIF. R. EVID. 13–16 (UNIF. L. COMM'N 1953) (explaining the effect of presumptions, how to resolve inconsistencies between presumptions, and how presumptions effect burdens of proof).

153. *See* FRIEDMAN & DEAHL, *supra* note 7, at 42–51 (summarizing the legislative history for Rules 301 and 302).

As things stand, the rules look like aphorisms inserted into an evidence code. One can imagine other rules along these lines: "A party who seeks to establish a claim has the burden of producing evidence to support each element of that claim." Or "the party who seeks to introduce the testimony of a witness bears the burden of telling the witness the location of the court and the time of the hearing." But none of these are evidence rules. Or even legal rules. They are just generic comments about topics that must be covered more comprehensively elsewhere in the law.

Both rules have RWR's of less than 1, meaning they are discussed more in secondary sources than in judicial opinions. And it is telling that Rules 301 and 302 apply only to presumptions "in a civil case."[154] Due to congressional equivocation, judges in criminal cases get no such analogous guidance.[155] Yet no one seems to mind.

XIX. RULES 803(7) & (10) (ABSENCE OF RECORDS)

There are a host of hearsay exceptions that don't do much. But many of those rules do change admissibility, so they escape (barely) the superfluous label. The story is different for Rules 803(7) and 803(10).[156] These rules exempt evidence offered to prove the absence of a record in a compilation of either business or public records from the hearsay prohibition in Rule 802.[157] And they are not needed. The absence of a record is either not hearsay at all (and so not in need of an exception) or readily established by introducing the complete record.[158] The Rules' drafters recognized this point, explaining the inclusion of these rules on the ground that "decisions may be found which class the evidence not only as hearsay but also as not within any exception."[159] It's a familiar story. The drafters knew that courts were already getting this wrong under the common law and so included these rules to try to avoid ongoing errors under the Federal Rules.

---

154. FED. R. EVID. 301–302.

155. Proposed Rule 303 governing presumptions in criminal cases was not adopted. *See* FED. R. EVID. 301 advisory committee's note to 1972 proposed rules (referencing Rule 303 as "deleted"); FRIEDMAN & DEAHL, *supra* note 7, at 52 (reprinting lengthy proposed rule).

156. FED. R. EVID. 803(7), (10). Rule 803(10) also includes a certificate provision that makes it easier for public employees to avoid testifying to the absence of a public record.

157. *See id.* at 803(7), (10) (exempting evidence from the hearsay prohibition if, in the case of Rule 803(7), the evidence is offered to prove the absence of a record of a regularly conducted activity, and in the case of Rule 803(10), the evidence is offered to prove the absence of a public record).

158. *See* Wright & Bellin, *supra* note 39, § 6902 (detailing critiques).

159. FED. R. EVID. 803(7) advisory committee's note to 1972 proposed rules.

XX. RULE 903 (SUBSCRIBING WITNESSES)

Rule 903 states, "A subscribing witness's testimony is necessary to authenticate a writing only if required by the law of the jurisdiction that governs its validity . . . ."[160]

Rule 903 garners almost no case cites and a scandalous RWR of 0.25. And, again, it is a reaction to the common law. The Federal Rules' drafters explained, "The common law required that attesting witnesses be produced or accounted for. Today the requirement has generally been abolished except with respect to documents which must be attested to be valid, e.g., wills in some states."[161]

The pattern is the same. The drafters identified a quirk of the common law that they did not view as necessary to a modern evidence code. And again, they included a rule that purported to do away with that quirk. But the Federal Rules had no need to include Rule 903 to accomplish that goal. The Federal Rules abolished the common-law rule regarding subscribing witnesses the moment they came into being without it.

XXI. RULES 101 AND 102 (TRUTH AND JUSTICE)

The Federal Rules of Evidence begin with two superfluous rules. Rule 101 points out where these *federal* rules apply ("proceedings in United States courts") but then confesses that the specifics "are set out in Rule 1101"—a rule that, unlike Rule 101, actually matters.[162] Rule 101 goes on to offer a series of unenlightening definitions, such as that a " 'civil case' means a civil action or proceeding."[163] Rule 101 is rarely cited and has a RWR below 1.

Next comes pure rhetorical flourish in Rule 102, a rule with a vanishing RWR of 0.43, meaning it has been referenced more than twice as often in secondary sources (905) than in judicial opinions (392) over the past half century. The rule states, "These rules should be construed so as to administer every proceeding fairly, eliminate unjustifiable expense and delay, and promote the development of evidence law, to the end of ascertaining the truth and securing a just determination."

Rule 102 only does something if you believe there is a judge somewhere thinking, "I would like to apply these rules in an unjustifiably expensive, delayed, unjust manner designed to undermine

160. FED. R. EVID. 903.

161. FED. R. EVID. 903 advisory committee's note to 1972 proposed rules.

162. FED. R. EVID. 101(a).

163. *Id.* at 101(b)(1). Not surprisingly, that definition still awaits its first cite in a federal or state judicial opinion.

evidence law and obscure truth . . . but pesky Rule 102 won't permit it!"[164]

CONCLUSION

While superfluous rules are not necessarily problematic, they can generate confusion while diverting attention from more meaningful areas of litigation, study, and scholarship. This is especially likely in the context of evidence law. Law students must learn, practitioners must invoke, and judges must apply the Rules of Evidence. And there are signs that they are struggling with these tasks.[165] To the extent many of the rules are confusing precisely because their role is obscured, exposing those rules' superfluous nature provides a universal benefit. If superfluous rules are to remain a part of the Rules of Evidence, we can improve understanding of those rules (and the rules project generally) by revealing their true nature.

164. *See* Cleary, *supra* note 2, at 912 (recognizing that Rule 102 "contributes little to the solution of particular problems of interpretation").

165. *See, e.g.*, Jeffrey Bellin & Diana Bibb, *The Modest Impact of the Modern Confrontation Clause*, 89 TENN. L. REV. 67, 122 (2021) (documenting "[t]he frequent appearance of hearsay errors in the case law"); Bellin, *supra* note 18, at 327–28 (illustrating common judicial errors in interpreting Rule 609); Michael S. Winograd, *Rules of Evidence in Labor Arbitration*, DISP. RESOL. J., May–Jul. 2000, at 45, 47 (describing the evidence rules as "infinitely numerous, complicated, and confusing even for legal scholars"); Margaret A. Berger, *The Federal Rules of Evidence: Defining and Refining the Goals of Codification*, 12 HOFSTRA L. REV. 255, 262 (1984) (noting areas of confusion for students and courts).