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Federal Rule of Evidence 106: A Proposal to Return to the Common Law Doctrine of Completeness

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Federal Rule of Evidence 106: A Proposal to Return to the Common Law Doctrine of Completeness

Federal Rule of Evidence 106 permits a party to require an adversary introducing a portion of a writing or recorded statement to "introduce any other part or any other writing or recorded statement which ought in fairness to be considered contemporaneously with it."[1] Rule 106 has its roots in the common law doctrine of completeness.[2] The rule reflects two primary concerns: (1) the misleading impression created by taking matters out of context and (2) the inadequacy of reparatory measures when delayed until later in the trial.[3] Therefore, Rule 106 requires contemporaneous introduction of the remainder of the statement to give the fact finder a clear understanding of the evidence.

In *United States v. Sutton*,[4] the Court of Appeals for the District of Columbia interpreted Federal Rule of Evidence 106 to allow a party to introduce otherwise inadmissible evidence in the interest of fairness to the moving party.[5] The *Sutton* ruling represents a departure from the trend of opinions in the federal courts concerning Rule 106.[6] However, the court's ruling is supported by the legislative history of the Rule[7] and opinions in state courts.[8]

This note examines the present status of Rule 106 and the possibility for expansion of the Rule. Part I traces the genesis and evolution of Rule 106. Part II considers how recent changes in the interpretation of Rule 106 may impact on litigation strategies. Part III argues for a uniform expansion of Rule 106 and suggests some guidelines for the exercise of

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1 FED. R. EVID. 106. Rule 106 provides: "When a writing or recorded statement or part thereof is introduced by a party, an adverse party may require him at that time to introduce any other part or any other writing or recorded statement which ought in fairness to be considered contemporaneously with it." The Federal Rules of Evidence were enacted pursuant to P.L. 93-595 § 1, 88 Stat. 1930 (1975) (codified at 28 U.S.C. app. (1982)). Congress enacted the Federal Rules of Evidence on January 2, 1975 and the Rules became effective July 1, 1975. *See generally* Cleary, *Preliminary Notes on Reading the Rules of Evidence*, 57 NEB. L. REV. 908 (1978).

2 FED. R. EVID. 106 advisory committee's note. *See infra* notes 9-18 and accompanying text. The Federal Rules of Evidence are reprinted in the United States Code at 28 U.S.C. app. (1982) and FEDERAL RULES OF DECISIONS begining at 56 F.R.D. 183 (1973).

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

4 801 F.2d 1346 (D.C. Cir. 1986). *See infra* notes 39-50 and accompanying text.

5 *Id.* at 1368.

6 *See, e.g.*, United States v. Terry, 702 F.2d 299 (2d Cir.), *cert. denied*, 461 U.S. 931 (1983); United States v. Costner, 684 F.2d 370 (6th Cir. 1982); United States v. Burreson, 643 F.2d 1344 (9th Cir.), *cert. denied*, 454 U.S. 803 (1981).

7 *Federal Rules of Evidence, 1975: Hearings on S. 523-41. Before the Senate Judiciary Comm.*, 94th Cong., 1st Sess. 121-22 (1975). *See also infra* notes 85-86 and accompanying text.

8 *See, e.g., Ex parte* Tucker, 474 So. 2d 134, *on remand*, Tucker v. State, 474 So. 2d 136 (Ala. 1985); Johnson v. State, 609 P.2d 533 (Alaska 1980); State v. Powers, 117 Ariz. 220, 571 P.2d 1016 (1977) (en banc); People v. Lowe, 660 P.2d 1261 (Colo. 1983); Rokus v. City of Bridgeport, 191 Conn. 62, 463 A.2d 253 (1983); Green v. State, 139 Ga. App. 652, 299 S.E.2d 129 (1983); People v. Shelly, 132 Ill. App. 3d 197, 477 N.E.2d 60 (1984); State v. Vinet, 466 So. 2d 544 (La. Ct. App. 1985); State v. Johnson, 479 A.2d 1284 (Me. 1984); White v. State, 56 Md. App. 265, 467 A.2d 771 (1983); State v. Easley, 662 S.W.2d 248 (Mo. 1983); Reado v. State, 690 S.W.2d 15 (Tex. Ct. App. 1984).

judicial discretion to foster controlled growth of the Rule. Part IV concludes that an expansive reading of Rule 106 best serves justice, although a court must closely scrutinize Rule 106 motions to ensure the introduction of such evidence comports with the purpose of the Rule.

I. The Completeness Doctrine

A. *The Development of Rule 106*

The completeness doctrine began as a common law rule of evidence. Federal Rule of Evidence 106 codifies the rule, but significantly modifies the doctrine relating to oral statements. Additionally, ambiguity surrounds Rule 106 as to whether it renders otherwise inadmissible evidence admissible. Thus, the circuits currently differ in their interpretation of the nature and purpose of Rule 106.

The advisory committee's note on Rule 106 states that "[t]he rule is an expression of the [common law] rule of completeness."[9] Many scholars and judges credit Professor Wigmore with recognizing and synthesizing the common law on the subject into a unified doctrine.[10] Wigmore reasoned: "We must compare the whole [utterance], not because we desire the remainder for its own sake, but because without it we cannot be sure we have the true sense and effect of the first part."[11] Wigmore illustrated the necessity of presenting an utterance in its entirety with an example from Algernon Sidney's trial[12] for seditious libel. Sidney argued against using passages of his allegedly seditious manuscript piecemeal by pointing out that incomplete biblical quotations may be blasphemous.[13] The court ruled in favor of Sidney reasoning: "It is true, in Scripture, it is said 'There is no God'; and you must not take that alone, but you must say, 'The fool hath said in his heart. There is no God.' "[14]

Wigmore provided different guidelines for completeness concerning oral utterances and written utterances.[15] Wigmore generally required that documents be introduced in their entirety,[16] while oral utterances

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

10 *See* D. LOUISELL & C. MUELLER, FEDERAL EVIDENCE § 49 (1977 Supp. 1983); MCCORMICK ON EVIDENCE § 56 (Cleary rev. 3d. ed. 1984); J. WEINSTEIN & M. BERGER, WEINSTEIN'S EVIDENCE 106(1) (1986); 21 C. WRIGHT & K. GRAHAM, FEDERAL PRACTICE AND PROCEDURE § 5071 (1977 & Supp. 1984). *See also* United States v. Sutton, 801 F.2d 1346, 1369 (D.C. Cir. 1986); United States v. Pintar, 630 F.2d 1270, 1284 (8th Cir. 1980); United States v. Renteria, 625 F.2d 1279, 1283 (5th Cir. 1980); United States v. McCorkle, 511 F.2d 482, 487 (7th Cir. 1975); United States v. Corrigan, 168 F.2d 641, 645 n.5 (2d Cir. 1948).

11 7 J. WIGMORE, EVIDENCE § 2094, at 594 (Chadbourn rev. 1978).

12 *Id.* at 601. (Noting 9 How St. Tr. 818, 829, 868 (1683)).

13 *Id.*

14 *Id.* The Biblical quotation referred to in the passage is *Psalms* XIV 1.

15 7 J. WIGMORE, *supra* note 11, § 2099, at 620-21 and § 2102, at 629-30.

16 *Id.* § 2102, at 629.

had to be introduced as a whole only in select situations.[17] Wigmore's formulation of the rule of completeness represented the common law.[18]

In 1972 the Supreme Court promulgated Federal Rule of Evidence 106 (then Federal Rule of Evidence 107).[19] Congress enacted the Rule unchanged from the Supreme Court's version.[20] Because Rule 106 may only be invoked when fairness dictates,[21] it involves considerable judicial discretion. Therefore, the trial court is free to act on Rule 106 motions as it believes justice requires and an appellate court will reverse only for an abuse of discretion.[22]

In *United States v. McCorkle*,[23] the Seventh Circuit held that the doctrine of verbal completeness is circumscribed by two qualifications. The portion sought to be admitted must be relevant to the issues at trial, and only those parts which qualify or explain the subject matter of the portion offered by the opponent need be admitted.[24] Thus, when a defendant in a criminal prosecution for failure to file a federal income tax return sought contemporaneous introduction of additional portions of a document which referred to the defendant's state of mind, the court correctly denied the motion because *mens rea* was not an issue in the case.[25] Courts

17 *Id.* § 2099, at 620-21. Wigmore noted a "singular lack of judicial authority" on the question of whether a proponent should be required to introduce all relevant portions of a conversation at the first instance. *Id.* Wigmore formulated three considerations for determining if a conversation should be introduced as a whole: (1) whether the oral utterance could be "marked off as a distinct whole"; (2) whether the witness could testify as to the entire utterance; and (3) whether the opponent has sufficient remedial powers available "at his stage of proof." Wigmore concluded that a court may require a proponent to offer the whole conversation when: (1) the oral utterances have legal effect in themselves (for example, an oral contract); (2) the evidence concerns testimony at a former trial; or (3) the oral utterance constitutes a confession. *Id.*

18 *See* United States v. Littwin, 338 F.2d 141, 145 (6th Cir.), *cert. denied*, 380 U.S. 911 (1964); United States v. Corrigan, 168 F.2d 641, 645 (2d Cir. 1948). *See also supra* note 10 and accompanying text.

19 Congress deleted Federal Rule of Evidence 105 from the Supreme Court's draft. Thus, the Supreme Court's Rule 107 was enacted as Rule 106. Congress, pursuant to U.S. CONST. art. III, § 2, has the power to enact rules of court. Through an enabling statute, Congress empowered the Supreme Court to promulgate the Federal Rules of Evidence. Rule 106 is modeled after Federal Rule of Civil Procedure 32(a)(4) (*see* FED. R. EVID. 106 advisory committee's note). Rule 32(a)(4) provides: "If only part of a deposition is offered into evidence by a party, an adverse party may require him to introduce any other part which ought in fairness be considered with the part introduced . . . ."

20 *See supra* note 1. *See also* FED. R. EVID. 106 federal judicial center note.

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

22 MCCORMICK, *supra* note 10, § 56, at 145. *See also* United States v. Ford, 771 F.2d 60 (2d Cir. 1985) (the trial court did not abuse its discretion by evaluating the credibility of a statement before admitting it into evidence pursuant to Rule 106). *See generally* United States v. Devous, 764 F.2d 1349 (10th Cir. 1985); United States v. Soures, 736 F.2d 87 (3d Cir.), *cert. denied*, 469 U.S. 1161 (1984); *In re* Air Crash Disaster at John F. Kennedy Int'l Airport, 635 F.2d 67 (2d Cir. 1980); United States v. Enright, 579 F.2d 980 (6th Cir. 1978); United States v. Wilson, 578 F.2d 67 (5th Cir. 1978); United States v. Greenfield, 574 F.2d 305 (5th Cir), *cert. denied*, 439 U.S. 860 (1978); United States v. Juarezs, 573 F.2d 267 (5th Cir.), *cert. denied*, 439 U.S. 915 (1978); United States v. Brinklow, 560 F.2d 1008 (10th Cir. 1977); United States v. Jones, 540 F.2d 465 (10th Cir.), *cert. denied*, 429 U.S. 1101 (1976).

23 511 F.2d 482 (7th Cir.) (en banc), *cert. denied*, 423 U.S. 826 (1975).

24 *Id.* at 487. The Seventh Circuit decided *McCorkle* in February 1975, five months before the Federal Rules of Evidence became effective. The ruling was not technically based on Rule 106, but rather on the common law doctrine of completeness. *See supra* note 2 and accompanying text. Courts have, however, cited *McCorkle* as a leading case on Rule 106. *See infra* note 26 and accompanying text.

25 *Id.* at 486-88.

have generally followed the *McCorkle* formula when ruling on Rule 106 issues.[26]

Courts have shown more sensitivity, however, to Rule 106 motions made by other criminal defendants.[27] In *United States v. Walker*,[28] the prosecution introduced portions of the defendant's testimony from a previous trial.[29] The defendant, a Chicago firefighter charged with extortion, sought to introduce additional portions of his testimony. The Seventh Circuit found the exclusion of the portions offered by the defendant was especially harsh in a criminal investigation because the exclusion denied the accused an opportunity to rebut the admitted evidence "without taking the stand."[30] The exclusion effectively limited the accused's constitutional right not to testify.[31] Therefore, the Seventh Circuit reversed Walker's conviction and remanded for a new trial.[32]

B. *Rule 106 and Otherwise Inadmissible Evidence*

At common law, the completeness doctrine was limited only on grounds of prejudice.[33] Currently, the circuits have ruled inconsistently regarding whether Rule 106 permits a party to introduce otherwise inadmissible evidence to place in context a portion of a document or recorded statement introduced by the adverse party.[34] The Sixth Circuit,

26 *See* United States v. Sutton, 801 F.2d 1346, 1369 (D.C. Cir. 1986); United States v. Smith, 794 F.2d 1333, 1335 (8th Cir.), *cert. denied*, 107 S. Ct. 419 (1986); United States v. Crosby, 713 F.2d 1066, 1074 (5th Cir. 1983); United States v. Marin, 669 F.2d 73, 85 (2nd Cir. 1982); United States v. Walker, 652 F.2d 708, 710 (7th Cir. 1981); United States v. Burreson, 643 F.2d 1344, 1349 (9th Cir.), *cert. denied sub nom.* Channell v United States, 454 U.S. 830 (1981); United States v. Phillips, 577 F.2d 495, 501 (9th Cir.), *cert. denied*, 469 U.S. 831 (1978).

27 *See Sutton*, 801 F.2d at 1369; United States v. Soures, 736 F.2d 87 (3d Cir. 1984); *Walker*, 652 F.2d at 711; *McCorkle*, 511 F.2d at 487. In *McCorkle*, the evidence which defendant McCorkle wished to introduce under Rule 106 went to his state of mind. Since scienter was not a issue in a prosecution for failure to file a income tax return, the court found the evidence irrelevant. Thus, the Seventh Circuit concluded that the denial of the Rule 106 motion did not impinge on McCorkle's fifth amendment rights. *McCorkle*, 511 F.2d at 488. *See infra* notes 31 & 64-77 and accompanying text.

28 652 F.2d 708 (7th Cir. 1981). Walker was convicted of extortion under color of official right in violation of 18 U.S.C. § 1951. Walker's first trial, at which he testified, resulted in a hung jury and was declared a mistrial. Walker was convicted at his second trial. *Id.* at 709.

29 *Id.* at 713.

30 *Id.*

31 U.S. CONST. amend. V. The fifth amendment provides, in relevant part: "No person . . . shall be compelled in any criminal case to be a witness against himself . . . ." The *Walker* court viewed the denial of Walker's Rule 106 motion to submit additional portions of his prior testimony as an unconstitutional pressure on Walker to testify in order to place the admitted portions of his prior testimony in context. *Walker*, 652 F.2d at 1373.

32 *Walker*, 652 F.2d at 1371.

33 MCCORMICK, *supra* note 10, § 56, at 145-46; 21 C. WRIGHT AND K. GRAHAM, *supra* note 10, § 5078, at 373.

34 Presently, the Sixth and Ninth Circuits hold that Rule 106 does not permit the introduction of otherwise inadmissible evidence. *See infra* notes 35-38 and accompanying text. Additionally, the Second Circuit has stated in dicta that "Rule 106 does not render admissible evidence that is otherwise inadmissible." United States v. Terry, 702 F.2d 299, 314 (2d Cir.), *cert. denied*, 461 U.S. 931 (1983). The District of Columbia Circuit, however, has held that Rule 106 does permit the introduction of otherwise inadmissible evidence. *See infra* notes 39-50 and accompanying text.

The Seventh Circuit, in dicta, has interpreted Rule 106 as being capable of rendering otherwise inadmissible evidence admissible. In United States v. LeFevour, 798 F.2d 977 (7th Cir. 1986), the court, per Judge Posner, stated that although Rule 106 is often described as merely regulating the

in *United States v. Costner*,[35] held that Rule 106 "covers an order of proof problem; it is not designed to make something admissible which should be excluded."[36] Similarly, the Ninth Circuit found, in *United States v. Burreson*,[37] that the United States District Court for the Central District of California did not abuse its discretion in denying a Rule 106 motion because the moving party's offered portion was "irrelevant and inadmissible hearsay."[38]

The District of Columbia Circuit, however, has held otherwise. In *United States v. Sutton*,[39] defendant Sucher moved for contemporaneous introduction of additional portions of the transcript of his conversation.[40] Sucher argued that the additional portions exculpated him because they demonstrated that his state of mind, a key issue at trial,[41] was inconsistent with guilt.[42] The Government objected to the defendant's motion arguing that the portions which Sucher wished to introduce con-

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order of proof, the better reading is that the Rule may allow the introduction of otherwise inadmissible evidence. *Id.* at 981.

The court also stated that Rule 106 "was not intended to override every . . . exclusionary rule of evidence . . . so there must be cases where if an excerpt is misleading the only cure is to exclude it . . . ." *Id.* Judge Posner's analysis while appealing, especially when the remainder is considered privileged, cannot withstand close scutiny. Rule 106 only permits a party to require an adversary, upon the adversary offering portions of a statement, to contemporaneously introduce relevant parts of the remainder. Rule 106 is a rule of inclusion, not exclusion; thus, a court acting within its sound discretion cannot exclude evidence pursuant to Rule 106.

Moreover, practical considerations argue against using Rule 106 to exclude evidence. Often a Rule 106 motion is only made upon an adversary's introduction of excerpts of a statement. In this situation a trial court could exclude the evidence only by issuing an order to strike. Such an order is not likely to correct a misleading impression from having the statement presented out of context. Thus, using Rule 106 as an exclusionary rule of evidence may be unfair to the moving party.

35 684 F.2d 370 (6th Cir. 1982). In *Costner*, the defendant was charged with making a false statement to a federally insured bank by presenting worthless titles to two vehicles as collateral for a loan. A defense witness testified, using reports he had prepared to refresh his memory (pursuant to FED. R. EVID. 612), that a prosecution witness made statements inconsistent with his testimony. The prosecution, under a Rule 106 motion, introduced additional portions of the report. These portions of the report referred to the defendant as a "con" and to prior bad acts of the defendant. The Sixth Circuit held that the evidence introduced under Rule 106 was inadmissible hearsay and should have been excluded. *Id.* at 373.

36 *Id.*

37 643 F.2d 1344 (9th Cir.), *cert. denied*, 454 U.S. 830 (1981). In *Burreson*, the defendants were convicted for violation of securities laws and investment fraud. At trial, the district court admitted portions of prior testimony given by the defendants at a Securities and Exchange Commission hearing. The court refused to grant the defendants' Rule 106 motion requesting that additional portions of the testimony be read into evidence. *Id.* at 1349.

38 *Id.*

39 801 F.2d 1346 (D.C. Cir. 1986).

40 *Id.* at 1366 n.15. The footnote documents the transcript which defendant Sucher sought to introduce. Sucher, a Department of Energy employee, appealed from a conviction for his role in a conspiracy to bribe federal officials to obstruct an investigation by the Department of Energy for noncompliance with price regulation. Sucher wished to introduce additional portions of a recorded conversation he had with Peacock, Sutton's intermediary. Sutton was engaged in the crude oil resale business and sought to illegally influence government officials involved in the regulation of the petroleum industry. Sucher's conversation with Peacock concerned representations that others in the Department of Energy made about Sucher to his superiors.

41 *Id.* Sucher's state of mind was a key issue at the trial because his defense rested on the contention that when he passed documents to a superior at the Department of Energy, he did not know that the documents were being used for an illegal purpose. Sucher alleged that he innocently passed the documents, upon request, to a superior at the office.

42 *Id.* at 1367.

stituted excludable hearsay.[43] The United States District Court for the District of Columbia denied Sucher's Rule 106 motion.[44]

The circuit court ruled that Sucher's evidence should have been admitted pursuant to Rule 106.[45] "Rule 106 can adequately fulfill its function only by permitting the admission of some otherwise inadmissible evidence when the court finds in fairness that the proffered evidence should be considered contemporaneously."[46] The court supported its position by citing a treatise by Professors Wright and Graham.[47] Wright and Graham argue that the text of Rule 106, read in conjunction with the Federal Rules of Evidence as a whole, permits the court's interpretation. The *Sutton* court would not construe Rule 106 as being restricted by other provisions in the Federal Rules of Evidence.[48] Additionally, the court noted that the Justice Department, in hearings on the Federal Rules of Evidence, requested that the Senate Judiciary Committee amend Rule 106 to only permit the introduction of otherwise admissible evidence pursuant to Rule 106.[49] The Committee made no such amendment.[50]

Thus, the circuits are split on the question of whether Rule 106 permits the introduction of otherwise inadmissible evidence. The split turns whether Rule 106 merely affects the order of proof[51] or if the Rule involves the "substance of evidence."[52]

C. *Rule 106 and Oral Statements*

Federal Rule of Evidence 106 differs significantly from the common law by excluding conversations.[53] The advisory committee stated: "For practical reasons, the Rule is limited to writings or recorded statements and does not apply to conversations."[54] Rule 106, however, does not affect a party's right to question a witness regarding additional portions of a conversation on cross examination.[55]

The case of *United States v. Littwin*[56] outlined the common law posi-

43 *Id.* at 1368.

44 *Id.* at 1370.

45 *Id.* at 1368. Although the court found error in the district court's refusal to admit portions of the transcript proffered by Sucher under his Rule 106 motion, the court found the error to be harmless in these circumstances. Because of clear and convincing independent evidence of Sucher's guilt, the court did not overturn the conviction. *Id.* at 1371.

46 *Id.* at 1368.

47 21 C. WRIGHT & K. GRAHAM, *supra* note 10, § 5071, at 339.

48 *Sutton*, 801 F.2d at 1368 (quoting 21 C. WRIGHT & K. GRAHAM, *supra* note 10, § 5078 at 376).

49 *Sutton*, 801 F.2d at 1368 n.17.

50 FED. R. EVID. 106. *See infra* notes 81-84 and accompanying text.

51 *Costner*, 684 F.2d at 373. *See supra* notes 35-36 and accompanying text.

52 *Sutton*, 801 F.2d at 1368. *See supra* notes 39-50 and accompanying text.

53 *See infra* notes 56-58.

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

55 *Id.* The advisory committee's note to Rule 106 affirmatively states: "The rule [106] does not in any way circumscribe the right of an adversary to develop the matter on cross-examination or as part of his own case." The advisory committee's view comports with Wigmore's position. *See* 7 J. WIGMORE, *supra* note 11, § 2113, at 653.

56 338 F.2d 141 (6th Cir. 1964). The prosecution charged defendant Littwin with bribery of an Internal Revenue Agent, in violation of 18 U.S.C. § 210. The defendant pleaded entrapment as a defense. At trial, the district court allowed the prosecution to begin to play a tape recording of a conversation between the defendant and an Internal Revenue Agent. The quality of the recording

tion on completeness before the adoption of Rule 106. In *Littwin*, the court stated:

> If one party to a litigation puts in evidence part of a document or a correspondence or a conversation . . . detrimental to the opposing party, the latter may introduce the balance of the document, correspondence or conversation in order to explain or rebut the adverse inferences which might arise from the incomplete character of the evidence.[57]

As *Littwin* indicates, until the adoption of the Federal Rules of Evidence, federal courts could require introduction of a whole conversation to avoid misleading the jury.

The "practical reasons" for limiting Rule 106 to writings and recorded statements appear to be that recorded statements and writings may be introduced in their entirety by simply reading the document or playing the tape.[58] The contemporaneous introduction of conversations, however, would require a party to use preliminary questions[59] to place the adverse party's evidence in context. Two parties questioning a witness in this fashion could potentially waste time and confuse both the jury and the witness.[60]

Federal Rule of Evidence 106 evolved from the common law doctrine of completeness with some significant changes.[61] Most importantly, Rule 106 does not apply to oral utterances.[62] Moreover, the circuit courts remain split on the fundamental nature of the Rule. This split has lead to conflicting decisions on whether Rule 106 permits the introduction of evidence otherwise proscribed by the Federal Rules of Evidence.[63]

II. Impact of Rule 106 on Litigation Strategy

An erroneous ruling on a Rule 106 issue may significantly affect a party's litigation strategy, particularly in a criminal trial. The Seventh

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was very poor and the court refused to allow the balance of the recording to be played. The defendant objected, based on the common law rule of completeness, arguing that the entire recording must be played. The court reasoned that the poor quality of the recording made it irrelevant evidence and the appellant failed to demonstrate any injury caused by the failure to play the tape in its entirety. Therefore, the Sixth Circuit held that the trial court acted within its discretion. *Id.* at 146.

57 *Id.* at 145.

58 The advisory committee did not delineate the practical difficulties in its note to Rule 106. The legislative history of Rule 106 does not indicate what these difficulties would be. Arguably, the advisory committee was referring to waste of time or confusion of the issues, since these considerations allow the exclusion of otherwise admissible evidence under other Federal Rules of Evidence. *See, e.g.*, FED. R. EVID. 403.

59 Federal Rule of Evidence 104 permits the use of preliminary questions.

60 A possible procedure for using preliminary questions to place oral statements in context would be to allow an adverse party, upon the proponent offering portions of the oral statements, to cross-examine the witness. The court would limit the scope of the cross-examination to inquiry into additional portions of the oral statements which place the proponents' evidence in context. The *McCorkle* test should be employed to determine if the questions are within the scope of the Rule. *See supra* notes 23-26 and accompanying text.

61 *See supra* notes 53-57 and accompanying text.

62 *See infra* notes 92-109 and accompanying text.

63 *See infra* notes 81-91 and accompanying text.

Circuit recognized this issue in *United States v. Walker*.[64] In *Walker*, the Government charged Walker, a Chicago firefighter, with extorting money from Nichols, an apartment building owner.[65] The Government sought to introduce passages from a transcript of Walker's testimony at a previous trial.[66] The defense moved under Rule 106 to introduce additional passages for contemporaneous consideration.[67] The defense's offer of proof included Walker's denial that he ever accepted Nichols' alleged bribe and a statement that he left the money offered by Nichols in plain sight.[68] The United States District Court for the Northern District of Illinois denied the Rule 106 motion.[69]

The Seventh Circuit reversed, holding that the offered evidence qualified for admission under Rule 106 and warranted a finding of an abuse of discretion due to its importance.[70] The court showed particular concern about the effect that an erroneous Rule 106 ruling may have on a criminal defendant:

> In criminal cases where the defendant elects not to testify . . . more is at stake than the order of proof. If the Government is not required to submit all relevant portions of the testimony which further explain selected parts which the Government has offered, the excluded portions may never be admitted. Thus, there may be no "repair work" [at a later point in the trial] . . . . [T]he Government's incomplete presentation may have painted a distorted picture of Walker's prior testimony which he was powerless to remedy without taking the stand.[71]

An absolute bar to admitting otherwise inadmissible evidence pursuant to Rule 106 could coerce defendants into taking the stand where they might otherwise choose not to testify, pursuant to their fifth amendment rights. *United States v. Sutton*[72] illustrates this point. The district court denied defendant Sucher's motion to add portions to passages of a transcript which the Government had introduced.[73] The court held the defendant's proffered evidence was "excludable out-of-court exculpatory statements concerning the defendant's state of mind."[74] Sucher, therefore, had the option of either allowing the State to put distorted testi-

64 652 F.2d 708 (7th Cir. 1981); *supra* notes 27-32.

65 *Id.* at 709-10.

66 *Id.* at 710.

67 *Id.* at 711.

68 *Id.* The court found that some of the excluded testimony did support Walker's allegation that he merely went to see Nichols to prevent his girlfriend from being evicted from Nichols' apartment building. The court, using the *McCorkle* test, found that the portions of Walker's prior testimony which the defense wished to introduce were both "relevant to specific portions of the Government's proof and explanatory of the excerpts already admitted." *Id.* at 709-11

69 *Id.* at 710.

70 *Id.* at 715.

71 *Id.* at 713. *See supra* note 31.

72 801 F.2d 1346 (D.C. Cir. 1986). *See supra* notes 39-50.

73 *Id.* at 1367. The court noted that Sucher originally requested that the trial court require the government to play the entirety of taped conversations between Sucher and Peacock. Sucher later limited his request to specific portions of the tape. On appeal, Sucher alleged error predicated on the court's refusal to require the introduction of the tape in its entirety. The District of Columbia Circuit ruled that by limiting his request to only specific portions of the recording, Sucher waived his objections to not admitting the entirety. *See also supra* note 45 and FED. R. EVID. 103(a)(1).

74 801 F.2d at 1367. *See also* FED. R. EVID. 801 and 802.

mony into evidence unrebutted or relinquishing "his Constitutional right not to testify."[75] If Sucher did take the stand, his testimony and credibility would be open for impeachment.[76] Therefore, the circuit court found that the district court's denial of Sucher's Rule 106 motion constituted error.[77]

The Sixth and Ninth Circuits' interpretation that Rule 106 does not permit the introduction of otherwise inadmissible evidence will, in some circumstances, circumscribe a defendant's right not to testify. Conversely, the District of Columbia Circuit's approach in *Sutton*, allowing the introduction of otherwise inadmissible evidence under Rule 106, could alter the evidence a party will seek to introduce. This interpretation results in Rule 106 being used as a "door opening" technique.[78] In other words, a party, when offering a portion of a writing or recorded statement into evidence, must anticipate the adversary taking advantage of the opportunity to introduce portions of the remainder of the statement, which would have been otherwise inadmissible. The adversary, however, would be restricted to placing the proponent's evidence in the proper context.

III. A Proposal to Expand Rule 106

Federal Rule of Evidence 106 should be expanded to allow the introduction of otherwise inadmissible evidence and oral statements. This growth would require the formulation of judicial guidelines to prevent abuse of the expanded Rule.[79] If proper guidelines can be developed, the growth of Rule 106 would serve the purpose of the Federal Rules of Evidence by providing for the presentation of clear, undistorted evidence.[80]

A. *Admission of Otherwise Inadmissible Evidence*

The question of admitting otherwise inadmissible evidence pursuant to Rule 106 turns on whether a court views Rule 106 as a procedural or a substantive rule of evidence. As Professors Wright and Graham note, Rule 106 does not contain the proviso, "except as otherwise provided by these rules".[81] All other major rules of admissibility contain the proviso

75 801 F.2d at 1367. *See also supra* note 31.

76 Federal Rule of Evidence 801 permits an adverse party to attack the credibility of a witness. Federal Rule of Evidence 611(b) defines the scope of cross-examination.

77 801 F.2d at 1370.

78 A "door opening" technique refers to a process by which the actions of an adverse party will open an area of inquiry which would otherwise not be permitted in the sound discretion of the court. An illustration of door opening occurs when the defendant in a criminal case offers evidence of his good character for a pertinent trait through a character witness. The door having been opened, the prosecution may then introduce negative evidence of defendant's character for the pertinent trait. *See* FED. R. EVID. 404(a)(1).

79 *See infra* notes 88-91 and accompanying text.

80 Federal Rule of Evidence 102 states: "These rules shall be construed to secure fairness in administration, elimination of unjustifiable expense and delay, and promotion of growth and development of the law of evidence to the end that the truth may be ascertained and proceedings justly determined."

81 21 C. WRIGHT & K. GRAHAM, *supra* note 10, § 5071, at 339-40.

which the drafters utilized to interrelate the Federal Rules of Evidence.[82] Logically, courts should not construe Rule 106 to be circumscribed by the balance of the Rules. Similarly, if Rule 106 was merely procedural, it would be superfluous; Rule 611(a) permits a court to control the order of proof.[83] Traditional rules of statutory construction indicate that the drafters of the Federal Rules of Evidence intended Rule 106 to be a substantive rule of evidence.[84]

Moreover, the legislative history of the Federal Rules of Evidence documents that Congress intended that Rule 106 not be limited to otherwise admissible evidence. The Justice Department's request to the Senate Judiciary Committee to limit Rule 106 evidence to otherwise admissible evidence was not granted.[85] Therefore, allowing a trial court discretion unfettered by the balance of the Federal Rules of Evidence is consistent with the legislative intent of Rule 106.[86]

The District of Columbia Circuit best interprets Rule 106. Allowing a court, in its discretion, to admit otherwise inadmissible portions of a statement to place other portions of the statement in context best serves the purpose of the rule—"[t]o prevent misleading impressions created by taking matters out of context."[87] Therefore, the Sixth and Ninth Circuits' interpretation of Rule 106, which bars the introduction of otherwise inadmissible evidence, should not be followed.

A trial court exercising its discretion on a Rule 106 motion concerning otherwise inadmissible evidence should admit the evidence only if there is a reasonable chance of a material distortion of the original statement without the inadmissible remainder. Courts must recognize the

82 *See, e.g.*, FED. R. EVID. 402 (irrelevant evidence); 501 (privileges); 602 (lack of personal knowledge); 613(b) (examining witness concerning prior statement); 704 (opinion on the ultimate issue); 802 (hearsay); 806 (credibility of the declarant); 901(b)(10) (methods of authentication); and 1002 (original writing). Under the *McCorkle* test, a Rule 106 motion would be subject to a Rule 401 relevancy challenge and, implicitly, a challenge on grounds of prejudice. United States v. McCorkle, 511 F.2d. 482, 487 (7th Cir. 1975). *See supra* notes 23-24, 33 & 50 and accompanying text.

83 Federal Rule of Evidence 611(a) provides, in relevant part: "The court shall exercise reasonable control over the mode and order of interrogating witnesses and presenting evidence . . . ."

84 It is assumed that whenever the legislature enacts a provision it is cognizant of a previous provision relating to the subject matter. Thus, a general rule of statutory interpretation is that a court should not interpret a provision of a statute as to render another provision in the statute meaningless. To interpret Rule 106 as being limited to admitting only otherwise admissible evidence would render it superflous because Rule 611(a) allows the court to accomplish the same thing through control over the sequence of proof. Therefore, courts should interpret Rule 106 as a substantive rule of evidence. *See* Allen v. Grand Central Aircraft Co., 347 U.S. 535 (1954); State v. Bundrant, 546 P.2d 530 (Alaska 1976); State v. Murtha, 179 Conn. 463, 427 A.2d 807 (1981); Monroe Park v. Metropolitan Life Ins. Co., 457 A.2d 734 (Del. 1983); Stanfill v. State, 360 So. 2d 128 (Fla. Dist. Ct. App. 1978); State v. Rauhauser, 272 N.W.2d (Iowa 1978); Northwest High School Dist. No. 82 of Hall & Merrick Counties v. Hessel, 210 Neb. 219, 313 N.W.2d 656 (1981); Autotote Ltd. v. New Jersey Exposition Auth., 85 N.J. 363, 427 A.2d 55 (1981); People v. Pease, 67 Misc. 2d 369, 324 N.Y.S.2d 129 (1971); Murray City v. Hall, 663 P.2d 1314 (Utah 1983).

85 *Federal Rules of Evidence, 1975: Hearings on S. 523-41 Before the Senate Judiciary Comm.*, 93rd Cong. 1st Sess. 121-22 (1975). The Justice Department sent a letter to Senator Eastland, Chairman of the Senate Judiciary Committee, requesting that the Committee amend Rule 106 to permit the admission of only otherwise admissible evidence. The letter also expressed concerns that Rule 106 could "usurp the function of cross-examination by disrupting the orderly presentation of evidence." *Id.*

86 The *McCorkle* test would guide the trial court when it evaluates a Rule 106 motion. *See supra* notes 26 & 82 and accompanying text.

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

danger of allowing untrustworthy evidence under a Rule 106 exception; allowing Rule 106 to supercede the other provisions of the Federal Rules of Evidence makes it a powerful tool which litigants could put to improper use.

Ordinarily, when a court considers a Rule 106 motion it will evaluate "[t]he danger of the creation of a misleading impression" and "[t]he inadequacy of repair work if delayed until later at trial."[88] When considering otherwise inadmissible evidence, however, a court must be cognizant that a party will have no opportunity to introduce this evidence at a later time.[89] Thus, a court must focus solely upon the danger of a misleading impression being created by the introduction of part of writing or recorded statement without mention of relevant portions of the remainder.

A court should weigh the need for the otherwise inadmissible evidence against the prospect of placing evidence opposed by competing policy considerations in front of the jury;[90] for instance, whether a court should allow hearsay to appear before a jury without a circumstantial guarantee of trustworthiness.[91] This problem could become quite acute if attorneys attempt to use an expansive Rule 106 solely to introduce evidence which cannot be introduced any other way.

When considering Rule 106 motions, the court should determine whether a reasonable chance exists that the admission of a statement without the inclusion of the otherwise inadmissible additional portion offered by the adverse party will result in a material distortion of the utterance. If a reasonable chance of a material distortion exists, the court should admit the otherwise inadmissible evidence for contemporaneous consideration.

B. *Admission of Oral Statements*

Rule 106 should also be expanded by bringing oral statements within its scope. Wigmore's original analysis and federal law up until the time of the adoption of the Federal Rules of Evidence included conversations under the completeness doctrine.[92] A trial court should possess the discretion to require the contemporaneous introduction of a whole conversation under Rule 106.

Rule 106 was limited to writings and recorded statements for "practical reasons".[93] Presumably, the advisory committee was referring to possible waste of time, confusion of the jury, and confusion of the wit-

88 *Id.* *See supra* note 26

89 If evidence is otherwise inadmissible, a party could not develop evidence at cross-examination or introduce it in his own case independent of Rule 106.

90 The Federal Rules of Evidence are constructed to allow liberal admission of relevant, trustworthy evidence. Thus, if evidence is inadmissible under the Rules, there are cogent reasons to keep it off the record. *See* FED. R. EVID. 102. *See also supra* note 80.

91 Federal Rule of Evidence 801(c) defines hearsay as: "A statement other than one made by the declarant, while testifying at trial or hearing, offered in evidence to prove the truth of the matter asserted." Courts regard hearsay as unreliable evidence because it cannot be cross-examined. *See* MCCORMICK, *supra* note 10, § 245, at 728. Exceptions to the rule against hearsay are based on a "circumstantial guarantee of trustworthiness" which substitutes for cross-examination. FED. R. EVID. 801 advisory committee's note. *See also* FED. R. EVID. 803 and 804.

92 *See supra* note 57 and accompanying text.

93 FED. R. EVID. 106 advisory committee's note. *See supra* notes 60-62 and accompanying text.

ness that could be caused by allowing an adverse party to put a conversation in context through the use of preliminary questions.[94] These concerns largely disappear when making a Rule 106 introduction of evidence with a writing or recorded statement. A court may simply require all relevant parts of a writing be read to the jury or all relevant parts of a tape be played to the jury. These factors, however, do not justify an absolute bar to the introduction of oral statements under Rule 106.

The distinction between documents and oral statements is ill considered. The better rule would allow a party to use Rule 106 with respect to oral statements when fairness dictates. Logically, the possibility of the distortion of a statement by taking it out of context will not differ depending on whether it is reduced to writing or not; nor will the inadequacy of repair work if delayed until a later point at trial differ between oral statements and writings or recorded statements. Thus, only serious practical difficulties could justify the distinction.

The discretionary nature of Rule 106 should diminish concerns over the practical difficulties of introducing oral statements under the Rule.[95] A court would be free to deny a Rule 106 motion because contemporaneous introduction of a conversation would waste time or would confuse the issue.[96] Moreover, contemporaneous introduction of a conversation may expedite a trial by alleviating the need for an advocate to reconstruct an entire conversation during cross-examination.[97] Additionally, if the jury hears the evidence concerning an oral statement only in context, they are likely to better understand the evidence than if they hear both distorted and undistorted versions of the statement. The trial court at least should be empowered with the discretion to proceed in this manner.

Currently, five states which track the Federal Rules of Evidence allow the introduction of oral statements under the states' equivalent to Rule 106.[98] The case of *United States v. Terry*[99] illustrates cogent reasons for expanding the scope of Federal Rule of Evidence 106. In *Terry*, four appellants alleged error predicated upon the trial court's admittance of tes-

94 The common law recognized that in certain circumstances a court should exclude relevant evidence on grounds of prejudice. Federal Rule of Evidence 403 codifies the common law. FED. R. EVID. 403 advisory committee's note. Rule 403 allows a court, in its discretion, to exclude relevant evidence when the probative value of the evidence is substantially outweighed by undue delay, waste of time or confusion of the issues, among other things. *See generally* Slough, *Relevancy Unraveled*, 5 U. KAN. L. REV. 1 (1956); Trautman, *Logical or Legal Relevancy—A Conflict in Theory*, 5 VAND. L. REV. 385 (1952). *See also supra* notes 33, 59-60 & 82 and accompanying text.

95 *See supra* notes 21-22 and accompanying text.

96 *See supra* note 94.

97 A common litigation strategy to impeach a witness is to rehash testimony of the witness and build up the witness' reliance on one particular statement as central to the credibility of the witness. Counsel then impeaches the witness with a prior inconsistent statement. *See* FED. R. EVID. 613. Rule 106 in no way compels a party to use the Rule or waive the right to develop the matter at a later stage of the trial. *See* FED R. EVID. 106 advisory committee's note and *supra* note 55.

98 Iowa, IOWA R. EVID. 106 (Special Pamph. 1983); Maine, State v. Johnson, 479 A.2d 1284 (Me. 1984), interprets ME. R. EVID. 106 (Rule pamph. 1980) as including conversations; Montana, MONT. CODE ANN. § 26-1-106 (1985); Nebraska, NEB. REV. STAT. § 27-106 (1975); and Oregon, OR. REV. STAT. § 40.040 (1976) allow the introduction of oral statements pursuant to the state's equivalent to Rule 106.

99 702 F.2d 299 (2d Cir.), *cert. denied*, 461 U.S. 931 (1983).

timony regarding the appellant's refusal to supply palm prints.[100] The Government introduced the evidence to demonstrate the appellants' consciousness of guilt.[101] The appellants wished to introduce oral statements they made at the time of the transaction which showed they refused to supply the palm prints because they wished to consult counsel before the authorities took their prints.[102]

The Second Circuit held that "[a]dmission was not mandated by Fed. R. Evid. 106 since that rule only applies to writings, not oral statements."[103] Additionally, the court stated in dicta that the statements were hearsay and "Rule 106 does not render admissible evidence that is otherwise inadmissible."[104]

Terry demonstrates a situation where excluding oral statements and otherwise inadmissible evidence from Rule 106 may be unfair. To allow the government to introduce evidence of the appellants' refusal to supply palm prints without revealing the appellants' motivation could distort the evidence.[105] Expansion of Rule 106 to include otherwise inadmissible evidence and oral statements would allow the defendants to place this evidence before the jury, even though it was oral hearsay, for the purpose of placing the proponents' evidence in context.

Commentators[106] have noted that under Federal Rule of Evidence 611(a), a court has the power to exercise control over "the mode and order of interrogating witnesses."[107] This power permits a court to require contemporaneous introduction of evidence concerning conversations in select situations. A court's power under Rule 611(a), however, is limited solely to "control over the mode and order of interrogating witnesses and presenting evidence."[108] Therefore, as McCormick notes, under Rule 611 a court could only "require the introduction of a remainder of a conversation, if the remainder is otherwise admissible."[109]

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100 *Id.* at 313. The appellants were convicted of violation of federal narcotics laws and conspiracy. The Government wished to take the appellants' palm prints in order to compare their prints with palm prints found on a plastic bag containing heroin.

101 *Id.* at 314. The Government also offered the prints to rebut inferences created by the defendants' counsel referring to the fact that the Government had failed to introduce the prints in its case-in-chief.

102 *Id.*

103 *Id.* The Second Circuit did find that the appellants' statements should have been admitted into evidence pursuant to Federal Rule of Evidence 803(3). Rule 803(3) excepts from the rule against hearsay "[a] statement of the declarant's then existing state of mind." (*See* FED. R. EVID. 802) Therefore, when the Government introduced evidence of the appellants refusal to supply palm prints, the defense was entitled to show the reason for refusal. But introduction of evidence under Rule 803(3) would not be contemporaneous with the government's proof. The court found that the exclusion of the evidence was harmless error. *Terry*, 702 F.2d at 314.

104 702 F.2d at 314.

105 The government argued that because the defendants had no legal basis for refusing to supply prints, the defense should not be allowed to state their reason for refusal. *Id.* This argument lacks merit because the Government sought to introduce evidence of the refusal to prove consciousness of guilt. The defense wished to rebut the evidence of consciousness of guilt, not challenge the Government's right to take palm prints.

106 *See* MCCORMICK, *supra* note 10, § 56, at 145; 21 C. WRIGHT AND K. GRAHAM, *supra* note 10, § 5078, at 374-75.

107 FED. R. EVID. 611. *See supra* note 83.

108 *See* FED. R. EVID. 106, MCCORMICK, *supra* note 10, § 56, at 145.

109 MCCORMICK, *supra* note 10, § 56, at 145.

IV. Conclusion

Federal Rule of Evidence 106 is a discretionary provision aimed at facilitating the presentation of clear, undistorted evidence to the fact finder. Expansion of Rule 106 to include oral statements and allow the admission of otherwise inadmissible evidence would enhance the Rule's ability to meet its purposes. Additionally, the expansion of Rule 106 would bring the Rule back to its common law form. The court, however, must closely scrutinize Rule 106 motions to avert abuse of the Rule. The court must exercise its discretion to grant Rule 106 motions only when the remainder offered is necessary to prevent the proponent's partial introduction of a statement from distorting the meaning of the statement. In this way, the expansion of Rule 106 remains consistent with the primary goal of the Federal Rules of Evidence—"the ascertainment of the truth and just determination of proceedings."[110]

James P. Gillespie

110 FED. R. EVID. 102. *See supra* note 80.