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Let's start with how federal sausage is made. Recently, I read that the chief policymaking body supervising rule drafting has 26 federal judges and no practicing lawyers. None. The committees voting on revisions have few practitioners and many judges, professors, and government employees. The legal geniuses in Congress made significant revisions in the evidence package sent over from the Court in 1972, delaying the effective date until January 2, 1975. It's little wonder that the Federal Rules of Evidence need changing. Here are some suggestions.

Rule 103(a)(2) should require the lawyers making an offer of proof to state the specific evidence principle justifying the offer. Part (a)(1) contains such a requirement for objections.

Should Rule 404(b) be amended to specify whether "person" applies only to the accused in a criminal trial? The Circuits are split, as outlined in the recent Sixth Circuit decision, *United States v. Lucas*.[1] If the other crimes exclusion is limited to accused defendants, then defense counsel is free to prove criminal conduct of other suspects to prove character conforming conduct tending to exonerate the accused client. Also, civil trials would not be covered by the exclusionary rule. "Person" would seem to include folks other than the accused, but either a rule change or a Supreme Court ruling is needed.

Whether a claim is "disputed" under Rule 408 at the time of a compromise offer is unclear. If I am in a car

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[1] 357 F.3d 599 (6th Cir. 2004).

wreck and offer to settle on the spot, is the claim disputed? There probably will be threats and a lawsuit later. Why should the policy to ban evidence of settlement offers not apply to my situation?

Meet the Honorable Susan Molinari and her pet Rules 413, 414, and 415.[2] When she was in Congress, her vote was sorely needed on some languishing legislation. In exchange for that vote, Molinari required the passage of rules allowing unconditional admissibility of other crimes to prove character and conforming conduct in criminal and civil trials involving sexual assault or child molestation. Her silly rules became the federal law of the land. Note, sausage lovers, that the Supreme Court had no involvement whatsoever. A delicious critique can be found in 159 F.R.D. 95 (1994). Luckily most of these criminal prosecutions are brought in state courts, but Rule 415 affects many federal and civil trials.

Rule 606(b) could use some work. Assume the jury is hung on liability or guilt. A juror suggests a coin toss to break the deadlock, and all agree. The choice is heads for the plaintiff and tails for the defendant, or heads for the United States and tails for the accused. Despite wringing of academic hands in treatises and law review articles, the trial judge is forbidden to even consider juror testimony or affidavits at a motion for new trial hearing. The rule bars inquiry into "any matter . . . occurring during the course of the jury's deliberations." The same would apply if a civil jury hung on damages reached a quotient verdict as a compromise.

There's not much wrong with Rule 609(a) as written, although it's poorly drafted, but the Supreme Court wrote two ridiculous opinions that need reversal through a redrafted rule. In *Luce v. United States*, the United States

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[2] Susan Molinari was a Member of Congress representing New York from 1990 to 1997.

Supreme Court held that an accused who does not take the witness stand has no appellate standing to complain of a trial judge's flat out wrong in limine ruling that a conviction is admissible to impeach.[3] So post-*Luce* I should put my willing client on the stand and bring out the erroneous impeaching conviction on direct to soften the blow, right? Nope, said the Court in *Ohler v. United States*.[4] I must let the government introduce the conviction on cross; otherwise I have no standing to complain on appeal.

Speaking of the dearth of trial lawyers on federal rules committees, compare the brief time in the legal trenches of Supreme Court justices. A colleague of mine places the average at around seven years in real law practice. Reckon I was qualified for the highest bench after only seven years of combat? Not hardly.

Why should the scope of cross-examination be limited to issues raised on direct, as required by Rule 611(b)? The cross-examiner can later call the witness at the next stage of proof, although that may cause problems via witness hostility. But a witness with knowledge of facts relevant to material issues should be required on cross to tell the jury about them then and there.

Rule 612 is not even a rule of evidence, but rather a discovery rule. It needs radical redrafting to codify the common law technique for refreshing recollection. Moreover, the provision permitting court-ordered production of a document shown the witness "before testifying" is unfair. If a Rule of Civil or Criminal Procedure permits discovery, so be it, but remove this language from the Federal Rules of Evidence.

Of all the policy decisions made by the judicial and legislative drafters, the most wrongheaded was to classify

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[3] 469 U.S. 38, 43 (1984).
[4] 529 U.S. 753 (2000).

some hearsay statements as "not hearsay." The following are listed in Rule 801(d):

* inconsistent statements sworn to at a hearing,
* consistent statements not to rehabilitate,
* statements of identification,
* opposing party admissions.

Each of these fits the definition of hearsay in Rule 801(c): "...a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." So why call hearsay "not hearsay"? The sainted Irving Younger was probably correct in guessing that the drafters wanted the world to know they read Wigmore, who argued that admissions don't trigger hearsay dangers.[5] How precious. These exceptions should be moved to Rule 803.

Lingering on admissions a moment longer, consider Rule 801(d)(2)(D) on statements by agents and "servants." For these to be trustworthy offers against the party/principal, the assertion should be against the agent's interest. Statements by employees that drip with self-serving motive and cast blame on coworkers or the boss should be excluded as untrustworthy. They come marching in, however, under the only two rule requirements: existence of the agency relationship and subject matter within the scope of agency.

Before we leave "not hearsay," let us compare Rules 803(7) and 803(10) with Rule 801(d). These exceptions cover the *absence* of an entry in a business record of public record to prove that an alleged fact never existed. But how is the absence of a statement a "statement" under the

[5] 5 J. Wigmore, Evidence § 1476, 352, and n. 9 (J. Chadbourn rev. ed. 1974).

hearsay definition? It is not, and these two bogus "exceptions" should be eliminated.

Rule 803(1) contains an unnecessary untrustworthy exception for statements of present sense impression. The declarant describes an event while perceiving it "or immediately thereafter." Until 1975, only Texas bought into this theory through *Houston Oxygen Co. v. Davis*,[6] which was once in all evidence casebooks. There Sally Cooper was heard to say as a Plymouth sped past her on the highway: "They must be drunk; we'll find them somewhere on the road wrecked if they keep that rate of speed up."[7] The two passengers who heard the words testified. Sally also testified. Aside from the dubious relevance, there was utterly no need for the hearsay, as jurors had the nonhearsay testimony of three witnesses concerning speed. But the court held reports of "present-sense impression" should be admissible as an exception to the hearsay rule. Academics loved the holding and added this ingredient to federal sausage.

Subparts (B) and (C) of Rule 803(8) are in need of tinkering or elimination. Statements in public records are admissible to prove matters where a public official had a legal duty to observe and report. So far so good. Then there is an exception in (B) for criminal cases, where reports containing matters observed by police and "other law enforcement personnel" are inadmissible hearsay. Why should those same reports be admissible in a civil trial? If they are untrustworthy in criminal trials, they are untrustworthy, period.

Rule 803(8)(C) has been construed to apply to official investigative findings that are far from "factual." *Beech Aircraft Corporation v. Rainey*[8] held admissible a JAG report opining that the cause of a Navy plane crash was

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[6] 161 S.W.2d 474 (Tex. 1942).
[7] *Id.* at 476.
[8] 488 U.S. 153, 170 (1988).

pilot error. Surely the plaintiff, widower of the allegedly negligent pilot, would like an opportunity to cross-examine. Even purely "factual" findings of government flunkies are often based on multiple hearsay from declarants not under an official duty to report truthfully. This part of Rule 803 should be deleted. If it is kept, it should be amended to conform to *Beech Aircraft*.

The common law limited the ancient documents exception to statements in 30-year-old property documents. Not so in Rule 803(16). Now any document, not just a property document, that is at least 20 years old can be introduced to prove the truth of statements therein. That is loony. Take the pre-Jayson Blair rag of record way back on January 2, 1894, two years before Adolph Ochs rescued it from the brink of bankruptcy. The headline on page 1 screamed, "Hillmon Tells His Story: The Murderer Found in the Mountains of Utah." That false statement would be admissible as true in a federal trial 110 years later. If getting to the truth depends on the accuracy of such a world class joke as *The New York Times*, heaven help us.

A frequently used ground of unavailability is that the declarant's trial attendance cannot be procured by a summons. Rule 804(a)(5) contains a silly difference for three exceptions, primarily the declaration against interest exception. In order for us to introduce a statement against interest, we must demonstrate that we were unable to subpoena the declarant for trial or to depose the declarant ("the declarant's attendance *or* testimony"). Since we can depose folks nationwide in federal suits, the two-pronged requirement eliminates this type of unavailability for the exception unless the declarant simply can't be located. That's why virtually all federal precedents involve declarations against interest by declarants who invoked the first unavailability ground by taking the Fifth.

Language in Rule 804(b)(1) defining former testimony allows a civil litigant to introduce a transcript against a

party who was not present at the prior hearing if a predecessor in interest was present. Some circuit courts have construed "predecessor in interest" to include anyone who had a similar motive to examine the declarant. An example of this construction is found in one of my appellate losses, *Clay v. Johns-Manville Sales Corp.*[9] Such a holding ignores both the language in the Rule and the legislative history. As Justice Thomas emphasized in *United States v. Salerno*,[10] courts are not at liberty to ignore what a rule plainly states. The person or entity at the former hearing must indeed be a predecessor in interest and must have had *both* an opportunity *and* a similar motive to examine the declarant. *Clay* is therefore no longer good law, but the predecessor in interest garbage should still be thrown out.

Finally, we have the residual exception in Rule 807. It allows federal judges to let in hearsay that goes beyond even the goofy exceptions discussed above. This rule should be stricken from the books. While it does exist, however, the objecting lawyer should remind liberal jurists that the final sentence conditions the use of this exception on pretrial notice of intention to offer the statement, the "particulars" of the statement, and name and address of the declarant. Consequently, it is illegal to use this exception as a last-minute fallback position.

Federal practice would be a better world if all or most of the changes suggested above were made. Do I think that will happen? Not unless the manufacturing process for sausage is radically altered. It won't be. Too many egos would get hurt.

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[9] 722 F.2d 1289 (6th Cir. 1983).
[10] 505 U.S. 317, 322 (1992).