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RECORDINGS, TRANSCRIPTS, AND TRANSLATIONS AS EVIDENCE

By Clifford S. Fishman*

Abstract: Secretly recorded conversations often play a vital role in criminal trials. However, circumstances such as background noise, accidents, regional or national idioms, jargon, or code may make it difficult for a jury to hear or understand what was said—even if all participants were speaking English. Thus, a recording's value as evidence will often depend on whether an accurate transcript may be distributed to the jury. This Article discusses several legal issues, including: Who should prepare a transcript? What should it contain? How should its accuracy be determined, and by whom? Should the transcript be considered evidence, or only an "aid to understanding" the recording? Should expert testimony be admitted to interpret jargon and codes?

When the conversation was in another language, additional issues arise: Who should translate the conversation into English? What methodology should the translator use? How should a court determine the accuracy of the translation? How should the conversation be presented to the jury? How can the adverse party challenge the accuracy of the translation before and during the trial?

By blending existing case law, general evidentiary principles, common sense and his own experience as a prosecutor, the author offers answers to each of these questions.

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INTRODUCTION

Surreptitiously recorded conversations have long played a prominent role in American trials.¹ Few, if any, forms of evidence are likely to be as probative—or as devastating. We see this most often in criminal cases: rather than rely on the testimony of witnesses who may be vulnerable to various forms of impeachment, a prosecutor simply allows a defendant’s words to speak for themselves.² It is quite difficult for a defense attorney to “impeach” a recording of criminals planning or reminiscing about their crimes. The impact of such evidence can be equally dramatic in civil litigation.³

Assuming the conversation was recorded lawfully,⁴ the use of the

1. The first U.S. Supreme Court decision to discuss the admissibility of a secretly recorded conversation was *Lopez v. United States*, 373 U.S. 427 (1963), but such recordings had been offered in state and federal trials for a considerable time before that. See *Thompson v. State*, 298 P.2d 464, 466–67 (Okla. Crim. App. 1956) (reviewing state and federal cases in which secretly recorded conversations were admissible at trial).

2. In the overwhelming majority of cases involving recordings, transcripts, and translations, a prosecutor is the offering party. The issues discussed in this Article are equally applicable, however, when such evidence is offered by a criminal defendant or civil litigant.

3. Use of recorded conversations by civil litigants arises in a variety of contexts, but the most frequent probably occurs in child custody actions. In the typical case, the custodial parent surreptitiously records the child’s telephone conversations with the other parent, an action which most courts consider lawful only if the custodial parent can establish that he or she did so, not to gather dirt against the other parent, but because of a good-faith concern about the child’s welfare. See, for example, *Cacciarelli v. Boniface*, 737 A.2d 1170, 1174–76 (N.J. Super. Ct. Ch. Div. 1999), in which a father, the custodial parent, surreptitiously taped his three young children’s phone conversations with their mother because they regularly became upset and cried and misbehaved after speaking to her. The court held that the tapes, which recorded the mother falsely telling the children that their father would put her in jail, force her to sell her house, and give away their dog, were admissible at a hearing on the mother’s motion to alter the custody arrangements. (The opinion does not indicate the ultimate outcome of the custody battle.) But such secret recording has its risks: the offended parent can sue for unlawful interception of communications, and it is generally a jury question whether the parent (lawfully) recorded the conversations because of a legitimate concern for the child’s welfare, or (unlawfully) did so merely out of spite to spy on the other parent. See generally CLIFFORD S. FISHMAN & ANNE T. MCKENNA, *WIRETAPPING AND EAVESDROPPING* § 7:16 (2d ed. 1995 & Supp.). (And while it is somewhat off the subject of this article, as a public service I’d like to point out, to any divorce lawyers reading this article, that most courts correctly hold that (a) it is a crime for one spouse to secretly tap the home phone in the hopes of gathering dirt to use against the other in a divorce action; (b) the offended spouse can sue the tapping spouse for damages; and (c) any attorney who advises a client to do so, or uses recordings of such conversations, can also be prosecuted or sued. See generally *id.* §§ 7:12–7:21.)

4. The U.S. Supreme Court has held that, so long as one participant in a conversation consents in advance, it does not constitute a “search” or “seizure” for law enforcement officials to surreptitiously record it. *United States v. White*, 401 U.S. 745, 746–50 (1971) (plurality opinion); *United States v. Caceres*, 440 U.S. 741, 746–53 (1979). Federal legislation similarly permits such

recording as evidence poses no significant issues if the participants are clearly identified and the recording is plainly audible and intelligible to judge and jury.⁵ Often, however, these ideal conditions do not exist. As a practical matter, therefore, the evidentiary value of a recorded conversation will often depend on whether the offering party can give the jury a transcript.

A variety of circumstances may render the recording difficult or impossible to understand on an initial listening. Identity may be a contested issue. Background noise may make it difficult to hear what was said. Several people may be speaking simultaneously. One or more participants in the conversation may speak with a pronounced accent. The conversants' use of slang, jargon, or code may increase the difficulties in making out what was said, let alone what the conversants meant.

The challenges surrounding recorded conversations are further compounded when some or all of the conversants speak in a language other than English. In that case, even if the recording is free of all of the problems just discussed, it has no evidentiary value unless an English translation is provided to the jury. It is perhaps a common attitude that translating a conversation from one language to another is a fairly mechanical process: pour the foreign language into a human "machine" called the "interpreter" or the "translator," and out comes the equivalent in English. In reality, the process is far more subjective than objective, and much more an art than a science, let alone a mechanical process.⁶

Part I of this Article examines the issues that arise when the party

interceptions without a search warrant or other judicial authorization. 18 U.S.C. § 2511(2)(c); see FISHMAN & MCKENNA, *supra* note 3, §§ 6:4, 6:11–6:12. Most state legislatures and courts follow the federal approach. For a state-by-state breakdown, see *id.* §§ 6:13–28. Other challenges to the legality of such interceptions are discussed in *id.* §§ 6:3, 6:5, 6:29–6:32.

Federal law also permits private citizens to record their own conversations without the knowledge or consent of other participants, unless the recording is made for the purpose of committing a crime or tort. 18 U.S.C. § 2511(2)(d). See FISHMAN & MCKENNA, *supra* note 3, §§ 6:33–6:37. Most states follow this approach, although some states require the consent of all participants. See *id.* at § 6:38. Absent the consent of a participant, a private citizen acting on his own may not lawfully wiretap or eavesdrop on a private communication, 18 U.S.C. § 2511(1). See FISHMAN & MCKENNA, *supra* note 3, §§ 4:1–4:12. And, with rare exceptions, law enforcement officials may do so only after obtaining an interception order which resembles a search warrant with many additional requirements and restrictions. See *generally id.*, ch. 8 (spelling out the requirements of a Title III interception order).

5. Audibility and intelligibility are defined and discussed *infra* at Part I.A.2.

6. Some of the problems typically faced by interpreters and translators are discussed *infra* at Part II.A.

offering a recording in evidence also seeks to have a transcript of that recording distributed to the jury. I argue that the traditional view—that the transcript is not evidence but merely an “aid” to the jury to help it “understand” the recording⁷—is unrealistic and fails to recognize or adequately address the challenges of presenting a recording as evidence. Some courts, by contrast, categorize a transcript as opinion evidence of the contents of the recording and direct that its admissibility should be regulated by the rules governing opinion testimony.⁸ Part I demonstrates that the latter approach addresses these issues far more realistically and honestly and should be followed by courts generally. Part I also addresses a variety of other issues, such as who should prepare the transcript and what it may and should contain, when it is offered as evidence.

Part II examines the issues that have arisen or are likely to arise with regard to recordings of conversations in languages other than English. These issues include: Who should translate and transcribe the conversation? How should the accuracy of the transcription and translation be tested and by whom? Should the recording itself be played for the jury? How should the translation be presented to the jury? What should the translation contain? What should the judge tell the jury about how they should use the translation as evidence?

I. RECORDINGS AND TRANSCRIPTS: BASIC PRINCIPLES

Before examining how courts should treat a recorded conversation in a language other than English, it is worthwhile to briefly review how courts do, and should, deal with recordings and transcripts of English-language conversations. A recording is admissible only if the offering party authenticates it and establishes its audibility and intelligibility. A transcript may be distributed to the jury only if its accuracy has been adequately shown.

A. Recordings

Like any physical object being offered in evidence, a recording must be authenticated: a litigant must offer evidence establishing that the object is what that litigant claims it is. It is also necessary to establish that it is possible for a listener to hear and understand what the recording

7. See *infra* notes 45–47 and accompanying text.

8. See *infra* notes 48–58 and accompanying text.

contains. Courts take a variety of approaches to each of these requirements.

I. Authentication

The first step in offering a recording (or a transcript or translation of the recording) into evidence is to authenticate the recording.⁹ Prior to the enactment of the Federal Rules of Evidence in 1975, many courts imposed strict and elaborate authentication requirements. One frequently cited authentication regime was first articulated by the Georgia Court of Appeals. In *Steve M. Solomon, Jr., Inc. v. Edgar*,¹⁰ the court stated:

A proper foundation for [the use of a mechanical transcription device] must be laid as follows: (1) It must be shown that the mechanical transcription device was capable of taking testimony. (2) It must be shown that the operator of the device was competent to operate the device. (3) The authenticity and correctness of the recording must be established. (4) It must be shown that changes, additions, or deletions have not been made. (5) The manner of preservation of the record must be shown. (6) Speakers must be identified. (7) It must be shown that the testimony elicited was freely and voluntarily made, without any kind of duress.¹¹

These seven requirements were cited approvingly by a number of state courts¹² and by the U.S. District Court for the Southern District of New York in *United States v. McKeever*,¹³ which in turn has been cited numerous times by other federal courts.¹⁴

9. For an extensive discussion of this topic, see FISHMAN & MCKENNA, *supra* note 3, §§ 24:13–20 (1995 & Supp. 2005).

10. 88 S.E.2d 167 (Ga. Ct. App. 1955).

11. *Id.* at 171.

12. See, e.g., *Alonzo v. State*, 219 So. 2d 858, 878 (Ala. 1969) (noting that the seven-factor test “appears to have been generally accepted as a correct statement of the law”); *Lamar v. State*, 282 N.E.2d 795, 797, 800 (Ind. 1972) (discussing and modifying the seven-factor test); *Commonwealth v. Brinkley*, 362 S.W.2d 494, 497 (Ky. 1962) (certifying that a proper foundation has been established for evidence that meets the seven-factor test); *Adams v. State*, 407 P.2d 169, 173 (Nev. 1965) (upholding foundation based on requirements set forth in the seven-factor test).

13. 169 F. Supp. 426, 430 (S.D.N.Y. 1958). The last requirement, “voluntarily made,” is often included with the other requirements, but, as I argue elsewhere, this requirement does not belong in the authentication process and merely muddies the authentication framework. See FISHMAN & MCKENNA, *supra* note 3, § 24:13(e) (Supp. 2005).

14. See, e.g., *United States v. Branch*, 970 F.2d 1368, 1371–72 (4th Cir. 1992) (noting that the seven *McKeever* factors “provide guidance to the district court when called upon to make rulings on authentication issues”); *United States v. Biggins*, 551 F.2d 64, 66 (5th Cir. 1977) (noting that

Rule 901(a) of the Federal Rules of Evidence, however, only requires that tape recordings satisfy the broad requirement necessary to authenticate any physical object. Rule 901(a) states: “The requirement of authentication or identification as a condition precedent to admissibility is satisfied by evidence sufficient to support a finding that the matter in question is what its proponent claims.”¹⁵ Federal courts and most state courts now apply the broad “sufficient to support a finding” standard to recordings of conversations.¹⁶

The broad “sufficient to support a finding” standard can be satisfied in a variety of ways. If a participant in the conversation (for example, an undercover agent or informant) is available to testify, it suffices for the witness to testify that he or she recalls the conversation, has listened to the recording, and is satisfied that the recording accurately captured what was said.¹⁷ If a participant is not available to testify, someone who

although they neither reject nor adopt the seven *McKeever* factors as a whole, some of the factors “may justifiably be imposed on the party seeking to introduce sound recording evidence”); *United States v. Starks*, 515 F.2d 112, 121 (3d Cir. 1975) (noting that the seven *McKeever* factors are a “useful exposition” in determining whether there is sufficient foundation for admission of a tape recording); *United States v. Millan*, 817 F. Supp. 1072, 1080 (S.D.N.Y. 1993) (noting that the Second Circuit has adopted a general standard in lieu of adopting the seven *McKeever* factors for all cases).

15. FED. R. EVID. 901(a). Uniform Rule of Evidence 901(a) is substantively identical.

16. See *infra* note 17 (listing cases that hold explicitly or implicitly that Federal Rule of Evidence 901(a) or equivalent state law regulates the authentication of recordings). *But see* *United States v. Hamilton*, 334 F.3d 170, 186 (2d Cir. 2003) (stating, in the same paragraph, that “the government [must] produce clear and convincing evidence of authenticity and accuracy as a foundation for the admission of such recordings” and that the appropriate standard is “sufficient to support a finding” (internal quotation marks omitted)).

17. See, e.g., *United States v. Brown*, 136 F.3d 1176, 1181 (7th Cir. 1998) (noting that the foundation for admitting a recording was properly laid where an informant testified that the tape truly and accurately recorded the conversation, that his initials were on the tape, and that the tapes were in the same condition as the last time he saw them); *United States v. White*, 116 F.3d 903, 920–21 (D.C. Cir. 1997) (holding that recordings were properly authenticated where “one witness testified at length about the process of creating the tapes and identified the originals, and where another witness confirmed the accuracy of the portions of the tapes with which he was familiar”); *United States v. Rodriguez*, 63 F.3d 1159, 1167 (1st Cir. 1995) (holding that a recording was properly authenticated where a testifying informant identified the tape, stated that the tape was accurate, and verified his own voice on the recording, and where witnesses corroborated aspects of the informant’s testimony and testified that the recording was not tampered with before trial); *United States v. Buchanan*, 70 F.3d 818, 827 (5th Cir. 1995), *amended by* 1995 U.S. App. LEXIS 40280 (5th Cir. Feb. 22, 1996) (holding that a recording was properly authenticated where government agents testified to being present at the recorded conversation, the making of the recording, and the accuracy of the reproduction of the conversation); *United States v. Clark*, 986 F.2d 65, 68–69 (4th Cir. 1993) (holding that the foundation of a recording was properly laid where an undercover agent testified to recording the conversation, taking the tape to be duplicated, listening to the copy, and confirming that it accurately reflected the conversation); *United States v.*

monitored the conversation as it occurred may authenticate it in the same fashion.¹⁸ In the absence of such a witness, the recording can be authenticated circumstantially.¹⁹

Under the more liberal approach, it is generally no longer necessary

Jones, 730 F.2d 593, 597 (10th Cir. 1984) (holding that the foundation for a recording was properly laid where an informant testified that he agreed to tape a conversation with defendant, personally recorded the conversation, identified the tape played in court as the tape he recorded, and testified that the voices on the tape were his and defendant's, and that this sufficed even where there was no testimony regarding the control of the tape before trial); Johnson v. State, 823 So. 2d 1, 23–25 (Ala. Crim. App. 2001) (holding that recordings of 911 calls were properly authenticated where a witness testified that the recordings were an accurate representation of what occurred during the calls, despite defendant's objection that the witness could not identify all background voices on the recording); Smithy v. State, 602 S.W.2d 676, 679–80 (Ark. 1980) (finding "that the testimony of participants to the conversation as to the accuracy of the tapes and the transcript, the testimony of a police officer who actually heard the conversations occur transmitted to him electronically, who had reviewed the written transcript as compared to the tape recording, and the review of the video tape recording of the conversation satisfies the requirements of Rule 901 and the testimony was admissible"); McCoy v. State, 853 So. 2d 396, 404 (Fla. 2003) (stating that "[n]othing more than this confirmation, by a participant in the conversation, that the tape fairly and accurately memorialized the discussion at issue is required to properly authenticate the recording"). *Accord* People v. Aliwoli, 606 N.E.2d 347, 361–62 (Ill. App. Ct. 1992); McCollum v. State, 582 N.E.2d 804, 811–12 (Ind. 1991); State v. Klindt, 389 N.W.2d 670, 674–75 (Iowa 1986); State v. Treadwell, 575 P.2d 550, 553 (Kan. 1978); State v. Vaughn, 431 So. 2d 763, 767–68 (La. 1983); State v. Cyran, 586 A.2d 1238, 1240–41 (Me. 1991); Berry v. State, 823 So. 2d 574, 576–77 (Miss. Ct. App. 2002); *In re L*———, 499 S.W.2d 490, 494 (Mo. 1973); People v. McGee, 399 N.E.2d 1177, 1182–83 (N.Y. 1979); State v. Jeffries, 303 S.E.2d 618, 620 (N.C. Ct. App. 1983); Commonwealth v. Starks, 450 A.2d 1363, 1364–65 (Pa. Super. Ct. 1982); Hasley v. State, 786 S.W.2d 733, 734–35 (Tex. App. 1989); Hensley v. State, 48 P.3d 1099, 1105–06 (Wyo. 2002).

18. See *United States v. Hamilton*, 334 F.3d 170, 186–87 (2d Cir. 2003) (holding that a recording was properly authenticated where a government witness testified to hearing and recording the conversation); *United States v. Rodriguez-Garcia*, 983 F.2d 1563, 1569 (10th Cir. 1993) (holding that testimony of a federal agent who listened in on recorded phone conversations between defendant and an undercover agent, and later participated in their transcription and translation, was sufficient to establish the authenticity of the recordings).

19. See, e.g., *United States v. Fuentes*, 563 F.2d 527, 532 (2d Cir. 1977). The informer who recorded his conversation with the defendant vanished before trial. *Id.* at 529. The Second Circuit held that the authentication requirement was satisfied by testimony of Drug Enforcement Administration (DEA) agents who had kept close surveillance on the informer during his meetings with the suspects and recovered the tapes after each of the meetings, although they could not hear the conversations as they occurred. *Id.* at 531–32. The court rejected defense speculation that the informer might have tampered with the tapes by manipulating the on/off switch during his conversations with the defendant, reasoning that attempting to do so might have gotten the informer killed. *Id.* at 532. See also *State v. Klindt*, 389 N.W.2d 670, 674 (Iowa 1986), *overruled on other grounds by State v. Reeves*, 636 N.W.2d 22, 25 (Iowa 2001) (holding that circumstantial evidence was sufficient to authenticate a tape that the informant gave to a friend for safekeeping before the informant disappeared); *State v. Jones*, 595 S.E.2d 124, 132–34 (N.C. 2004) (holding that a tape recording was sufficiently authenticated where it had been found ten months after the crime was committed but where persons who came in contact with the tape insisted that they did not tamper with it).

for the offering party to demonstrate the chain of custody for the tape from the time the conversation was first recorded on it to the date it is offered in evidence.²⁰ Even where courts do require such evidence, it is not necessary to account for the location and custody of the tape for “each minute” between those dates;²¹ it is sufficient to show a chain of custody which establishes the “reasonable probability that no tampering occurred.”²² Minor infirmities in the chain of custody are insufficient to bar admissibility of a recording, but are relevant as to the weight the jury chooses to give to it.²³ Nevertheless, even if chain of custody evidence is not legally required, such evidence is useful to help the offering party assure the jury that the tape has not been tampered with.

In a criminal case where the conversations were recorded pursuant to an interception order under federal or state statutes,²⁴ it suffices that a witness with knowledge testify generally about how the interception equipment was set up and tested, the procedures employed, and the

20. *Alonzi v. People*, 597 P.2d 560, 562 (Colo. 1979) (noting that “[a] chain of custody is necessitated only where it is not possible to establish the identification of the evidence by the testimony of a single witness”). Contrast *Alonzi* with *United States v. Starks*, 515 F.2d 112, 121–22 (3d Cir. 1975), decided prior to the enactment of the Federal Rules of Evidence, which held that chain of custody evidence is generally required unless chain of custody is unchallenged.

21. *Brooks v. State*, 234 S.E.2d 541, 550 (Ga. Ct. App. 1977) (quoting *Davis v. State*, 217 S.E.2d 343, 345 (Ga. Ct. App. 1975)).

22. *Wilson v. State*, 343 A.2d 613, 617 (Del. 1975). Similarly, see *United States v. Fuller*, 441 F.2d 755, 762 (4th Cir. 1971). See also *United States v. Brown*, 136 F.3d at 1182 (finding that where defendants did not suggest a break in the chain of custody, nor allege tampering or altering, “there is a presumption that a system of regularity accompanied the handling of the evidence if the exhibits are at all times within official custody”); *Summerall v. State*, 734 So. 2d 242, 245 (Miss. Ct. App. 1999); *People v. Portanova*, 392 N.Y.S.2d 123, 128 (N.Y. App. Div. 1977).

23. See, e.g., *People v. McGee*, 399 N.E.2d 1177, 1183 (N.Y. 1979).

24. In 1968, Congress enacted Title III of the Omnibus Crime Control and Safe Streets Act, which authorized federal prosecutors to apply for, and federal judges to issue, court orders authorizing the surreptitious interception of wire and oral communications. Pub. L. No. 90-351, 82 Stat. 212 (1968) (codified as amended at 18 U.S.C. §§ 2510–2520 (2000)). An interception order is in essence a search warrant, which must be based on probable cause and contain a particular description of the type of communications sought (i.e., the type of crime being investigated), but the statute imposes several additional requirements. See 18 U.S.C. §§ 2510–2520. For example, before an application is submitted to a federal judge, it must be approved by a high official in the U.S. Department of Justice, 18 U.S.C. § 2516(1), and the application must establish that investigators unsuccessfully tried to obtain comparable evidence by using ordinary investigative procedures, or that use of such procedures would be too dangerous or would have little chance of success. See 18 U.S.C. §§ 2518(1)(c), (3)(c). Title III authorized state legislatures to enact similar legislation, so long as state law protects communicational privacy at least as fully. 18 U.S.C. § 2516(2). (Electronic communications were added in the Electronic Communications Privacy Act of 1986, Pub. L. 99-508, 100 Stat. 1848.) For an exhaustive analysis of federal and state law, see FISHMAN & MCKENNA, *supra* note 3.

records that were kept documenting the interceptions.²⁵ It is not necessary to authenticate each individual conversation.²⁶ Recordings made pursuant to specific statutes often must comply with additional statutory requirements.²⁷

2. Audibility and Intelligibility

The evidentiary value of a recorded conversation depends in large measure on who said what, but a jury's ability to use that information depends upon two qualities of the recording:²⁸ audibility and intelligibility. Audibility relates to whether the listener is able to hear what is on the recording. Intelligibility relates to whether the listener is able to understand what the conversants said. The issue courts most often focus on is intelligibility.²⁹

Issues relating to the audibility and intelligibility of a recording should be litigated prior to trial. The offering party has the initial burden of establishing a recording's audibility and intelligibility.³⁰ Some recordings are plainly audible and intelligible; as to them no problem arises. Many recordings, however, are only marginally audible or intelligible.³¹ The ultimate test of audibility and intelligibility is whether

25. See *United States v. Cortelleso*, 663 F.2d 361, 364 (1st Cir. 1981); *United States v. Cuesta*, 597 F.2d 903, 914–15 (5th Cir. 1979).

26. *Cortelleso*, 663 F.2d at 664; *Cuesta*, 597 F.2d at 914–15.

27. For example, 18 U.S.C. § 2518(8)(a) imposes requirements on conversations intercepted without the consent of a participant, but pursuant to an interception order:

Immediately upon the expiration of the period of the order, or extensions thereof, such recordings shall be made available to the judge issuing such order and sealed under his directions. Custody of the recordings shall be wherever the judge orders. . . . The presence of the seal provided for by this subsection, or a satisfactory explanation for the absence thereof, shall be a prerequisite for the use or disclosure of the contents of any wire, oral, or electronic communication or evidence derived therefrom [at any court proceeding].

State statutes contain corresponding provisions. For a detailed discussion of the sealing requirement, see FISHMAN & MCKENNA, *supra* note 3, ch. 16.

28. Most of the issues discussed in this Article arise whether the case is being tried to a judge or to a jury. However, when a jury is hearing the case, these issues pose much more challenging questions. Accordingly, this Article addresses these issues in the jury trial context.

29. An inaudible recording is by definition unintelligible: if it is impossible to hear what is on the tape, it is also impossible to understand what is said on it. On the other hand, a recording may be perfectly audible without being intelligible; the listener may have no difficulty hearing background noise and multiple voices but be unable to discern what specific people are saying.

30. See 23 AM. JUR. PROOF OF FACTS 3D *Foundation for Audio Recordings as Evidence* 315 (2005) (noting that the offering party has the burden of production, which is satisfied by adequate foundation evidence).

31. See, e.g., *United States v. Moncivais*, 401 F.3d 751, 756 (6th Cir. 2005).

the offering party has been able to produce a transcript of the recording which accurately reflects the recording's contents.³²

Frequently, recordings contain inaudible or unintelligible passages because of background noise, mechanical difficulties, or other problems. As a rule, partial inaudibility or unintelligibility is not a bar to admissibility if the court is satisfied that the jury would not be forced to speculate about the contents of the inaudible or unintelligible portions.³³ Where, however, the prosecution produces a transcript of a recording which, to everyone but the transcriber, is unintelligible, the only appropriate response is to exclude both the tape and the transcript.³⁴

32. *Id.* (rejecting defendant's motion to exclude a consensual recording of marginal sound quality on the grounds that an expert translator, *hired by the defendant*, testified that he was able to transcribe most of the tape, albeit with difficulties). Issues relating to transcript accuracy are discussed *infra* at Part I.B.5.

33. *Moncivais*, 401 F.3d at 756; *United States v. Font-Ramirez*, 944 F.2d 42, 46–47 (1st Cir. 1991); *United States v. Mittleider*, 835 F.2d 769, 773 (10th Cir. 1987) (other aspects abrogated by *Staples v. United States*, 511 U.S. 600 (1994)); *United States v. Sims*, 719 F.2d 375, 379 (11th Cir. 1983); *United States v. Jones*, 693 F.2d 343, 346–47 (5th Cir. 1982); *United States v. Slade*, 627 F.2d 293, 301–02 (D.C. Cir. 1980); *United States v. Frazier*, 479 F.2d 983, 985 (2d Cir. 1973); *Avery v. State*, 589 So. 2d 1313, 1315 (Ala. Crim. App. 1991); *Bell v. State*, 668 P.2d 829, 835–36 (Alaska Ct. App. 1983); *State v. Kennedy*, 592 P.2d 1288, 1293 (Ariz. Ct. App. 1979); *Loy v. State*, 832 S.W.2d 499, 500–01 (Ark. 1992); *People v. Siripongs*, 754 P.2d 1306, 1320–21 (Cal. 1988); *People v. Jeffers*, 690 P.2d 194, 198–99 (Colo. 1984); *People v. Haider*, 829 P.2d 455, 456–57 (Colo. Ct. App. 1991); *McCoy v. State*, 853 So. 2d 396, 402–04 (Fla. 2003); *Guess v. State*, 443 S.E.2d 477, 479 (Ga. 1994); *Coleman v. State*, 750 N.E.2d 370, 372–73 (Ind. 2001); *Johnson v. Commonwealth*, 90 S.W.3d 39, 45–46 (Ky. 2002), *as modified*, (Jan. 13, 2003); *Commonwealth v. Silva*, 516 N.E.2d 161, 166–67 (Mass. 1987); *Easter v. State*, 878 So. 2d 10, 19 (Miss. 2004); *In re L—*, 499 S.W.2d 490, 494 (Mo. 1973); *State v. Loveless*, 308 N.W.2d 842, 846–47 (Neb. 1981); *People v. Lubow*, 272 N.E.2d 331, 336 (N.Y. 1971); *State v. Coleman*, 707 N.E.2d 476, 488 (Ohio 1999); *Cooper v. State*, 671 P.2d 1168, 1172 (Okla. Crim. App. 1983); *State v. Donato*, 414 A.2d 797, 805 (R.I. 1980); *State v. Harris*, 286 S.E.2d 251, 255 (W. Va. 1982). Where a malfunction results in recording only the informant's half of a conversation, not the defendant's, the recording, and the informant's testimony about the conversation are admissible, despite defendant's claim that his statements (which were unrecorded) were all exculpatory, so long as the defendant had the opportunity to cross-examine the informant and to testify about the conversation. *United States v. Apperson*, 441 F.3d 1162, 1198 (10th Cir. 2006) (inferentially holding that what the defendant did or did not say was simply a factual issue for the jury to resolve).

34. One such case involved the lamentable disappearance of a five-month old girl from her parents' home. *See United States v. Aisenberg*, 358 F.3d 1327, 1333–34 (11th Cir. 2004). Local police quickly came to suspect the parents, and obtained court orders authorizing the wiretapping and bugging of the couple's home; based on the tapes, the parents were indicted by the federal government for obstructing the investigation into the disappearance. *See id.* at 1331–32. Ultimately the government dismissed the indictment, implicitly acknowledging, among other things, that the local police had lied in their application for the original interception orders and on the applications for extensions, and that the tapes were so unintelligible that the purported transcripts were essentially fictitious. *See id.* at 1333–34. The parents sued for attorneys' fees and expenses under the Hyde Act, 18 U.S.C. § 3006A (2000), which requires plaintiffs to establish that "the position of

B. Transcripts

The use of a transcript of a recorded conversation at trial raises issues of authentication, admissibility, and presentation. These issues include: Who should be permitted to prepare such a transcript? What should it contain? How should it be authenticated? How should its accuracy be tested, and who (judge or jury) has the ultimate say in its accuracy? What use may the jury make of a transcript, and how should the judge instruct the jury on the matter? Should a jury be permitted to receive the transcript in the jury room during deliberations?

1. Transcribing and Authenticating the Transcript

It is axiomatic that if a litigant wants the jury to consider any exhibit or item of evidence, it is up to that litigant to produce it; the same is true with regard to the transcript of a recorded conversation. If a conversation was recorded with the consent of a participant, such as an undercover officer, the question arises: should the consenting participant prepare the transcript? On first impression, the answer might seem obvious: of course. After all, she was there; she participated; she *knows* what was said; and she is the witness who can most readily testify about the conversation, authenticate the tape, and attest to the transcript's accuracy. Having the undercover participant prepare the transcript also saves time and resources, because there is no need to assign the task to someone else. Accordingly, courts generally permit the offering party to distribute a transcript prepared in whole or in part by a participant in the conversation,³⁵ assuming the transcript's accuracy has been adequately

the United States was vexatious, frivolous, or in bad faith." See *Aisenberg*, 358 F.3d at 1335. The government *conceded* that the parents were entitled to recover fees and expenses, but *contested* the amount the trial judge awarded. See *id.* at 1335–36. The child's fate is still a mystery. See CBS NEWS, *Where's Baby Sabrina?*, Jan. 13, 2005, <http://www.cbsnews.com/stories/2005/01/13/48hours/main666740.shtml?CMP=ILC-SearchStories>.

35. When affirming the admissibility of an informant's transcription of a recording in which he was a conversant, a First Circuit panel explained:

The objectivity of the transcriber of a tape obviously bears on the decision whether or not to admit a transcript into evidence. The tape recording and not the transcript is evidence in the case. The transcript should, therefore, mirror the tape and should not be an amalgam of the recording and the hearsay testimony of persons present at the conversation. Where inaccuracies in the transcript combine with possible bias in the transcription process, a transcript may be excluded from evidence. The touchstone, however, is the accuracy of the transcript.

United States v. Font-Ramirez, 944 F.2d 42, 48 (1st Cir. 1991) (internal citation omitted). See also *Slade*, 627 F.2d at 303 (participant in conversation can help identify the voices during transcript preparation); *Henry v. State*, 629 So. 2d 1058, 1059 (Fla. Dist. Ct. App. 1993) (allowing for the authentication of a transcript by having "the person who prepared the transcript . . . testify that he

established.³⁶

Some courts, however, have held that a transcript prepared by a participant should not be distributed to the jury.³⁷ This assures that, with regard to portions of the recording that are difficult to make out, the transcriber has not filled in those passages with what she remembers from the conversation, rather than what the recording actually contains, and prevents the participant from, in essence, corroborating her own testimony as to what was said.³⁸ And even if participant transcription is allowed, where a recording is difficult to make out, the party offering the transcript may gain a subtle tactical advantage if a non-participant in the investigation prepares the transcript because the jury is more likely to

witnessed the events recited in the transcript and thus had personal knowledge that the transcript was an accurate rendition of the tape-recording"); *State v. Smith*, 656 S.W.2d 882, 888 (Tenn. Crim. App. 1983) (holding that it is permissible for a consenting participant to make clarifications and additions to the transcript).

New York's intermediate appellate courts are divided on the subject. Compare the decision by the First Department of the New York Supreme Court, Appellate Division in *People v. Reynolds*, 595 N.Y.S.2d 451, 452 (N.Y. App. Div. 1993), explicitly authorizing admission of a transcript prepared by the undercover officer who participated in the conversation, with the Second Department's approach, enunciated in *People v. Mincey*, 406 N.Y.S.2d 526, 527 (N.Y. App. Div. 1978) (disapproving of this procedure). See also *People v. Batista*, 703 N.Y.S.2d 885, 887 (N.Y. Sup. Ct. 2000) (noting the different approaches to the question taken by the Second Department and the First, in which New York County is located).

36. See *infra* Part I.B.5.

37. A New York appellate court has expressed concern about the possibility of distributing a participant's transcript to the jury, holding that where a tape is "inaudible," the fact that a participant can transcribe it "will not render the tape admissible since that individual is relying on his memory, not the actual sounds on tape . . ." *People v. Warner*, 510 N.Y.S.2d 292, 293 (N.Y. App. Div. 1987) (citing *Mincey*, 406 N.Y.S.2d 526). That court therefore frowns on permitting a participant in the conversation to prepare the transcript. See also *People v. Colon*, 449 N.Y.S.2d 11, 11 (N.Y. App. Div. 1982). Instead, the transcript must be prepared by an independent third party. See *Mincey*, 406 N.Y.S.2d at 527. But where the recordings are clear enough so that "independent third parties can listen to [them] and produce a reasonable transcript," it is permissible that the transcripts be prepared by police officers who heard the conversation as it took place. *Warner*, 510 N.Y.S.2d at 292 (quoting *Mincey*, 406 N.Y.S.2d at 527).

On the other hand, Ohio appellate courts are divided as to the propriety of allowing a participant to prepare the transcript. Compare *Harleysville Mut. Ins. Co. v. Santora*, 444 N.E.2d 1076, 1081 (Ohio Ct. App. 1982) (holding that admission of a transcript was reversible error where the transcript was prepared by a participant of the conversation and the recording of the conversation was both available and audible) with *State v. Holmes*, 521 N.E.2d 479, 485-86 (Ohio Ct. App. 1987) (finding no prejudicial error despite preparation of the transcript by a nonobjective party and availability of the original recordings, because "appellant [wa]s unable to point out any material differences between the tapes and the transcript supplied to the jury as listening aids"). Courts have addressed similar issues with regard to who should translate a non-English conversation. See *infra* notes 123-127 and accompanying text.

38. See *supra* note 37.

accept the word of someone who has no direct stake in the case.

The question also arises: may the transcribing of a recorded conversation be a group project? Anyone who has attempted to transcribe a recorded conversation knows from experience that, just as in general “two heads are better than one,” when transcribing difficult passages of a recording, four ears (or six, or eight . . .) are often better than two. It is entirely appropriate for the person transcribing a recording to ask other people to give a listen, to see if someone else can make out a passage that has stumped the transcriber.³⁹ Quite often the new listener is able to do so. Most of us have experienced something very much like this: You hear a song on the radio, and you like it, but there is a lyric or two that you just can’t “get,” even after hearing it several times (“The girl with colitis goes by”). Then you happen to be in your car with a friend when the song comes on, and you ask your friend, “What was that last bit that they sang?” As soon as your friend says “The girl with kaleidoscope eyes,” you immediately know that your friend is right. The next time the song plays, you can hear those words quite plainly.⁴⁰ So, too, with transcripts: If person “X” is unable to “solve” a particular passage but, once person “Y” has done so, X is able to hear for himself that Y is correct, then X can honestly testify that in his opinion the transcript—including the portion first solved, deciphered, or pieced together by Y—is accurate.⁴¹

While it can be helpful or necessary to have more than one person transcribe difficult passages, it is improper for the offering party to decide the recording’s, and therefore the transcript’s, contents by “consensus.”⁴² Thus, the witness who will testify to the accuracy of the transcript must be the final arbiter of what the offering party’s transcript

39. Such was my experience as a prosecutor, and this procedure was highly recommended by the translators and transcribers with whom I have spoken in researching this Article.

40. See Pamela LiCalzi O’Connell, *Sweet Slips of the Ear: Mondegreens*, N.Y. TIMES, Apr. 9, 1998, at G4 (citing examples of famous song lines that listeners may hear incorrectly, such as “Hold me closer, Tony Danza” for Elton John’s “Hold me closer, tiny dancer”; in the Beatles’ song, *Lucy in the Sky With Diamonds*, “The girl with colitis goes by” for “The girl with kaleidoscope eyes”; and “scuse me while I kiss this guy” for Jimi Hendrix’s “scuse me while I kiss the sky”); see also THE ARCHIVE OF MISHEARD LYRICS, <http://www.kissthisguy.com>.

41. See, e.g., *People v. Batista*, 703 N.Y.S.2d 885, 886–88 (N.Y. Sup. Ct. 2002).

42. See *United States v. Robinson*, 707 F.2d 872, 876–79 (6th Cir. 1983). Several transcript drafts were compared and discussed; the final product was a consensus as to what the tapes did, and the transcripts should, contain. *Id.* at 877. Thus, no one person was able to testify that in his or her opinion, the transcript was accurate. *Id.* at 879. In light of the questionable audibility and intelligibility of the tapes themselves, the court held that distribution of the “consensus transcripts” was reversible error. *Id.*

will contain. If other investigators claim to be able to discern what is said in a passage but that passage on the recording is inaudible or unintelligible to the person who is to testify, that portion of the tape must be transcribed as “inaudible” or “unintelligible.”

2. *The Transcript's Role*

There is perhaps little need to provide a jury with a transcript of an English language conversation which is recorded with sound-studio quality and in which the participants speak slowly and clearly with accents that are readily understandable to all listeners. Such recordings may be available with some frequency on television cop shows. In the real world, however, they are somewhat less frequent. Accordingly, the evidentiary value of a recorded conversation will often depend to a significant extent on whether the offering party is allowed to provide a transcript of the recording to the jury. This, in turn, may depend on how the court categorizes the transcript. Some courts regard a transcript as merely an aid to assist the jury in understanding what is on the recording.⁴³ Others consider the transcript as opinion evidence which should be tested under the standards that apply generally to opinion evidence.⁴⁴

A number of courts insist that only the recording itself is actual evidence, and that the transcript is merely an aid to assist the jury in following what is on the recording. This rationale was enunciated in *People v. Feld*,⁴⁵ a widely cited 1953 decision of New York's highest court:

To allow the court and jurors to hold in their hands a transcript as they listened to the playback of the records was no different than allowing them to have, in an appropriate case, a photograph, a drawing, a map or a mechanical model, any of which have long been recognized as an assistance to understanding.⁴⁶

Endorsements of this approach may still be found in the case law.⁴⁷

43. *See infra* notes 45–47 and accompanying text.

44. *See infra* notes 48–58 and accompanying text.

45. 113 N.E.2d 440 (N.Y. 1953).

46. *Id.* at 444.

47. *See, e.g.*, *United States v. Brandon*, 363 F.3d 341, 343 (4th Cir. 2004); *McCoy v. State*, 853 So. 2d 396, 402–03 (Fla. 2003); *Guess v. State*, 443 S.E.2d 477, 479–80 (Ga. 1994); *State v. Owens*, 643 N.W.2d 735, 754–55 (S.D. 2002); *Mayhue v. State*, 969 S.W.2d 503, 506–07 (Tex.

A more realistic view, articulated by the Fifth Circuit in *United States v. Onori*,⁴⁸ is that once a transcript has been authenticated and evidence has been introduced as to its accuracy, the transcript is admissible opinion evidence as to what is said on the recording.⁴⁹ In *Onori*, the government had recorded conversations with the consent of a participant.⁵⁰ At trial, a government agent testified as to how she had prepared a transcript of the conversations.⁵¹ At a hearing held in the jury's absence, a defense expert testified "that there were more than fifty errors in the government's transcript," particularly with regard to voice identifications of the declarants.⁵² The trial judge offered to allow the defense witness to testify before the jury and to allow the jury to see and compare the government's transcript with the defense's transcript "to help it decide the question of which portions of each transcript were correct."⁵³ However, "[t]he defense, contending that the government's version of the conversation was highly prejudicial, rejected this offer," and only the government's transcript was made available to the jury.⁵⁴ When the judge made the government's transcript available, he instructed the jury that the transcript was not itself evidence, but was being provided only for the jury's "convenience," and to assist jurors in identifying the voices.⁵⁵ The Fifth Circuit upheld the trial judge's distribution of the government's transcript, but concluded that "the best

Crim. App. 1998); *Jackson v. Commonwealth*, 590 S.E.2d 520, 532-33 (Va. 2004); *Burns v. Commonwealth*, 541 S.E.2d 872, 888 (Va. 2001); *State v. Hardesty*, 461 S.E.2d 478, 483-84 (W. Va. 1995). Each of these courts therefore holds that the judge must instruct the jury that the transcript is not evidence and must not be considered as such.

48. 535 F.2d 938 (5th Cir. 1976).

49. *Id.* at 947-48. Although the court did not explicitly use the term "opinion evidence," it compared conflicting testimony about the contents of a recording to conflicting testimony from handwriting experts as to whether a signature on a document is genuine. See *infra* note 58 and accompanying text. Signature authenticity is a well-established subject of expert opinion testimony. See, e.g., FED. R. EVID. 901(b)(3) (permitting authentication of contested handwriting by an expert who has compared the contested document to an authenticated exemplar).

50. *Onori*, 535 F.2d at 941.

51. *Id.* at 946.

52. *Id.* at 947, 949 n.7.

53. *Id.* at 947.

54. *Id.* at 947, 949. The opinion does not explain why the defense did not take the judge up on this offer, but it appears that the defense goal was not so much to assure that the jury received an accurate transcript, but to prevent the jury from seeing *any* transcript. This would be a plausible strategy if, for example, the defense expert's testimony about supposed voice misidentifications on the transcript would simply have reattributed incriminating statements from one defendant to another without ultimately weakening the government's case.

55. *Id.* at 946.

procedure for the use of transcripts was not followed in this case,” and proceeded to “review this problem area in some depth and to suggest more appropriate means of dealing with contested transcripts.”⁵⁶ The “vagueness” of the “assist the jury concept,” the court commented, produced “confusion” as to the transcripts’ role and the procedures to be followed,⁵⁷ and suggested the following in its stead:

We believe that the use of a transcript as a guide is analogous to the use of expert testimony as a device aiding a jury in understanding other types of real evidence. For example, an issue in a case may be whether John Doe’s purported signature on a document is actually John Doe’s signature. Two handwriting experts may disagree, and if they are asked to testify on each side of the dispute, their divergent testimony creates a jury issue. . . . Here two “experts” [and their respective transcripts] were available to aid the jury in determining the real issue presented, the content and meaning of the tape recordings.

It is therefore incorrect to think of the transcripts as simply an “aid”—as better lighting fixtures in the courtroom would be an “aid” to the jury’s vision of witnesses—and not as evidence of any kind. They are evidence and, like other evidence, may be admitted for a limited purpose only. That purpose here, as the court outlined in its special instruction, was primarily to establish the identity of the speakers at any particular time.⁵⁸

As a practical matter, the approach a court takes is often unimportant, either because the adverse party does not challenge the accuracy of the transcript, or because the transcript’s accuracy is so readily apparent that a judge would make it available to the jury regardless of whether the transcript is categorized as evidence of the contents of the recording, or only as an aid to understanding the recording. Sometimes, however, how the transcript is categorized may determine how several of the other issues are resolved, including whether the tape and transcript may be presented to the jury at all. The *Onori* approach, that a transcript of a marginally intelligible recording constitutes opinion evidence of its contents, more realistically reflects the actual role that the transcript of such recording plays when the recording and transcript are offered to a jury than does the “aid to understanding” concept. Not surprisingly, a

56. *Id.* at 947.

57. *Id.*

58. *Id.*

substantial number of courts have confirmed the value of the *Onori* approach by adopting it.⁵⁹

If the transcript is regarded as opinion evidence, the question arises: should it be considered expert opinion or lay opinion evidence? Federal Rule of Evidence 702 defines expert testimony as that based on “scientific, technical, or other specialized knowledge.”⁶⁰ The translation of a foreign language conversation into English obviously does require “specialized knowledge” and therefore is regulated by Rule 702.⁶¹ Whether transcribing an English language conversation falls within this definition is unclear; arguably, the process generally requires only a good ear and a great deal of patience.⁶² If so, the transcript constitutes lay witness opinion evidence, which is governed by Federal Rule of Evidence 701:

Rule 701. Opinion Testimony by Lay Witnesses

If the witness is not testifying as an expert, the witness’ testimony in the form of opinions or inferences is limited to those opinions or inferences which are (a) rationally based on the perception of the witness and (b) helpful to a clear understanding of the witness’ testimony or the determination of a fact in issue, and (c) not based on scientific, technical, or other specialized knowledge within the scope of Rule 702.⁶³

A litigant should have no difficulty establishing that the transcript of a marginally intelligible recording falls within this definition. If a recording is plagued by background noise and other characteristics that make it difficult to discern what was said, a witness who has listened to a recording numerous times has “perceived” the contents of the recording in a way which a juror in a courtroom cannot. Moreover, the more difficult the recording is to understand on an initial listening, the more the witness’ transcript of the conversation is “helpful . . . to . . . the determination of a fact in issue,” i.e., to a determination of who said

59. See, e.g., *United States v. Collazo*, 732 F.2d 1200, 1203 (4th Cir. 1984). *But see* *United States v. Brandon*, 363 F.3d 341, 343, (4th Cir. 2004) (observing approvingly that a district judge gave an “aid in listening” instruction); *United States v. Rrapi*, 175 F.3d 742, 746 (9th Cir. 1999); *United States v. Hogan*, 986 F.2d 1364, 1376 (11th Cir. 1993); *People v. Polk*, 54 Cal. Rptr. 2d 921, 926–27 (Cal. Ct. App. 1996); *State v. Loveless*, 308 N.W.2d 842, 846–47 (Neb. 1981).

60. FED. R. EVID. 702.

61. See *infra* at Part II.B.1.

62. In *Onori*, the Fifth Circuit referred to the witnesses who prepared the transcript as “experts” in quotation marks. See *supra* text accompanying note 58.

63. FED. R. EVID. 701. (Rule 701 of the Uniform Rules of Evidence is substantively identical.)

what.

Thus, the admissibility of the transcript of an English language conversation will not depend upon whether it is categorized as lay or expert opinion testimony. The only real difference between the two is that, assuming an appropriate discovery request is made, the prosecutor is required to disclose prior to trial its expert witness's "opinions, the bases and reasons for those opinions, and the witness's qualifications."⁶⁴ But since issues relating to the transcript are generally litigated prior to trial, the adverse side will receive notice and disclosure in any event.

3. "Best Evidence Rule"

Occasionally a party against whom a transcript is offered will object that the use of a transcript of a recording as evidence violates the "best evidence rule." It does not.⁶⁵ The so-called "best evidence rule," more properly called the "original writing" rule, does not require a party to offer the "best" evidence to prove a fact. Its purpose is to safeguard against inaccuracies or fraud⁶⁶ and to assure that, when the content of a particular writing is of central importance to a lawsuit, a litigant should be required to present the writing itself whenever possible.⁶⁷ The rule merely directs that to prove the contents of a writing (or in this case, a recording), a party must either introduce the original⁶⁸ or a duplicate,⁶⁹

64. See FED. R. CRIM. P. 16(a)(1)(G). (Defense counsel has a similar obligation. See *id.* at 16(b)(1)(B)–(C).). The same, of course, is true of both parties in civil litigation. See FED. R. CIV. P. 26(a)(2)(A). If the transcript is considered lay witness evidence, it would appear to be discoverable under the Federal Rules of Criminal Procedure, which, upon defense request, require disclosure of "documents, . . . tangible objects," etc. which are material to the defense or which the government intends to introduce during its case-in-chief. FED. R. CRIM. P. 16(a)(1)(E).

65. *United States v. Holton*, 116 F.3d 1536, 1545 (D.C. Cir. 1997); *Jackson v. State*, 594 So.2d 1289, 1297 (Ala. Crim. App. 1991). For a detailed discussion of the application of the "best evidence rule" to transcripts of recordings, see FISHMAN & MCKENNA, *supra* note 3, at §§ 25:26–25:32.

66. See, e.g., FED. R. EVID. 1001 advisory committee's note, 56 F.R.D. 183, 341.

67. See, e.g., 2 MCCORMICK ON EVIDENCE § 231 (John W. Strong ed., 5th ed. 1999).

68. See FED. R. EVID. 1002: "To prove the content of a writing, recording, or photograph, the original writing, recording, or photograph is required, except as otherwise provided in these rules or by Act of Congress." Uniform Rule of Evidence 1002 is substantively identical.

69. Federal Rule of Evidence, Rule 1003 directs that a duplicate "is admissible to the same extent as an original unless (1) a genuine question is raised as to the authenticity of the original or (2) in the circumstances it would be unfair to admit the duplicate in lieu of the original." Similarly, see UNIF. R. EVID. 1003. "Duplicate" is defined as "a counterpart produced by the same impression as the original, or from the same matrix, or by means of photography, including enlargements and

or must offer an adequate explanation why she is unable to do so; thereafter, secondary evidence is admissible.⁷⁰ Most often, the offering party will in fact introduce the original recording into evidence, then offer the transcript as opinion evidence of its contents, much as a litigant might offer a photograph into evidence and then call a witness to explain to the jury what the photograph portrays.⁷¹ Neither the witness's testimony about the photograph nor the transcriber's testimony and transcript violate the "original writing (recording) rule"; each is intended to make the "original" evidence understandable to the jury.⁷²

4. *Transcript Contents*

Courts permit a party to distribute a transcript of a recording to the jury for two purposes: to help the jury ascertain who is speaking and what was said. This raises two questions. First, should the transcript identify the speakers? If so, under what circumstances? Second, what (if anything) besides the words spoken during the conversation should appear in the transcript?

miniatures, or by mechanical or electronic re-recording, or by chemical reproduction, or by other equivalent techniques which accurately reproduces the original." FED. R. EVID. 1001(4). Similarly, see UNIF. R. EVID. 1001(1).

70. Federal Rule of Evidence, Rule 1004 provides:

Rule 1004. Admissibility of Other Evidence of Contents

The original is not required, and other evidence of the contents of a writing, recording, or photograph is admissible if—

- (1) Originals lost or destroyed. All originals are lost or have been destroyed, unless the proponent lost or destroyed them in bad faith; or
- (2) Original not obtainable. No original can be obtained by any available judicial process or procedure; or
- (3) Original in possession of opponent. At a time when an original was under the control of the party against whom offered, that party was put on notice, by the pleadings or otherwise, that the contents would be a subject of proof at the hearing, and that party does not produce the original at the hearing; or
- (4) Collateral matters. The writing, recording, or photograph is not closely related to a controlling issue.

Similarly, see UNIF. R. EVID. 1004.

71. The analogy to a witness explaining what is shown in a photograph—the vantage point from which it is taken, the focal length of the lens, the significance of what is shown in the photograph—presupposes that the transcript is lay witness opinion evidence. Alternatively, if the transcript is viewed as expert opinion evidence, the analogy might be to an X-ray, which is the "original" evidence, and a doctor's testimony explaining its significance to the jury. Regarding whether the transcript of an English language conversation should be considered lay or expert opinion testimony, see *supra* notes 60–64 and accompanying text.

72. For a more detailed discussion, see FISHMAN & MCKENNA, *supra* note 3, §§ 25:26–32.

a. Identifying the Speakers

A recorded conversation that is offered to prove what *X* and *Y* said to each other is not admissible as such unless the offering party introduces sufficient evidence identifying the conversants as *X* and *Y*. The issue is in essence one of conditional relevancy: the conversation is relevant against a participant only if the condition of identification has been satisfied.⁷³ In federal proceedings the issue is governed by Federal Rule of Evidence 901(a), which requires only that the offering party set forth “evidence sufficient to support a finding that the matter in question is what its proponent claims.”⁷⁴

The U.S. Supreme Court has defined “evidence sufficient to support a finding” as enough evidence to permit a rational jury to find a fact by a preponderance of the evidence.⁷⁵ This requirement may be satisfied with regard to voice identification in a variety of ways.⁷⁶ A participant in the recorded conversation can satisfy the requirement simply by testifying that he has listened to the tape and read the transcript and is satisfied that the voices are correctly identified.⁷⁷ Someone who has spoken to *X* either before or after a particular conversation was recorded may listen to the recording and testify that he recognizes *X*'s voice on the recording.⁷⁸ *X* could be compelled to produce a voice exemplar.⁷⁹ Or a

73. See, e.g., FED. R. EVID. 104(b):

Relevancy conditioned on fact. When the relevancy of evidence depends upon the fulfillment of a condition of fact, the court shall admit it upon, or subject to, the introduction of evidence sufficient to support a finding of the fulfillment of the condition.

74. The text of Federal Rule of Evidence 901(a) is set out *supra* in the text accompanying note 15.

75. *Huddleston v. United States*, 485 U.S. 681, 690 (1988) (applying the “sufficient to support a finding” standard to Federal Rule of Evidence 404(b), governing the admissibility of extrinsic acts).

76. For a detailed discussion of voice identification, see FISHMAN & MCKENNA, *supra* note 3, §§ 24:19–25.

77. See, e.g., FED. R. EVID. 901(b)(1) (the requirement of authentication or identification may be satisfied by the testimony of a person with knowledge); *United States v. Scott*, 243 F.3d 1103, 1107 (8th Cir. 2001); *United States v. Carrasco*, 887 F.2d 794, 803 (7th Cir. 1989); *People v. Griffin*, 592 N.E.2d 930, 933–34 (Ill. 1992).

78. See FED. R. EVID. 901(b)(5) (“Identification of a voice, whether heard firsthand or through mechanical or electronic transmission or recording, by opinion based upon hearing the voice at any time under circumstances connecting it with the alleged speaker,” suffices to satisfy the identification requirement); *United States v. White*, 116 F.3d 903, 920–21 (D.C. Cir. 1997); *United States v. DiMuro*, 540 F.2d 503, 513 (1st Cir. 1976); *Rushing v. Rushing*, 724 So.2d 911, 915 (Miss. 1998); *Wilburn v. State*, 856 So.2d 686, 688–89 (Miss. Ct. App. 2003). One common technique is to have investigators speak during the booking process to various suspects who have been arrested at the end of an investigation involving wiretapping or oral intercepts, and, based on that familiarity with their voices, provide voice identification testimony at trial. This technique does

voice can be identified by circumstantial evidence.⁸⁰

Courts generally agree that, so long as the offering party has elicited sufficient evidence to satisfy this standard and the jury is told that the attribution of names to speakers on the transcript is something the offering party has to prove,⁸¹ the transcript may identify the speakers.⁸²

b. Prohibition Against Aural Editorializing

If the transcript is received as evidence of what the recording contains, the transcript is governed by the “mirror the tape” rule. Common sense dictates that, other than the identity of the conversants, the transcript should contain only what can actually be heard on the recording. Although a *witness* may “narrate” the recording while testifying, explaining what physical actions accompanied each passage or sound on the tape, the transcript that is distributed to the jury “should . . . mirror the tape and should not be an amalgam of the recording and the hearsay testimony of persons present at the conversation.”⁸³

not violate the Fourth Amendment. *See* *United States v. Ceballos*, 385 F.3d 1120, 1123–24 (7th Cir. 2004). Concerning the Fifth Amendment, see *infra* note 79.

79. In *United States v. Dionisio*, 410 U.S. 1 (1973), the Supreme Court held that a person has no Fourth or Fifth Amendment right against the use of his physical characteristics, such as the sound of his voice, and that therefore requiring a grand jury witness to produce voice exemplars did not violate the witness’s Fourth or Fifth Amendment rights. *Id.* at 12, 14–15. The exemplar could be played for the jury, which could make its own comparison and assessment. *See* FED. R. EVID. 901(b)(3) (“[c]omparison by the trier of fact or by expert witnesses with specimens which have been authenticated” suffices to satisfy the identification requirement).

80. *See, e.g.*, FED. R. EVID. 901(b)(4) (“contents, substance, internal patterns, or other distinctive characteristics, taken in conjunction with circumstances”).

81. *See, e.g.*, *United States v. Rochan*, 563 F.2d 1246, 1251 (5th Cir. 1977); *United States v. DiMuro*, 540 F.2d 503, 511 (1st Cir. 1976).

82. *See* *United States v. Gonzalez-Balderas*, 11 F.3d 1218, 1224 (5th Cir. 1994) (noting that “[a]fter the government authenticated the transcripts as accurate renditions of [the tapes], it was incumbent on [defendant] to raise any specific objections that he may have had to the identification of a particular speaker”). *See also* *United States v. Frazier*, 274 F.3d 1185, 1198–2000 (8th Cir. 2001); *United States v. Henneberry*, 719 F.2d 941, 948–49 (8th Cir. 1983); *United States v. Slade*, 627 F.2d 293, 299–300, 302–03 (D.C. Cir. 1980); *United States v. Hall*, 342 F.2d 849, 853 (4th Cir. 1965); *People v. Gable*, 647 P.2d 246, 256 (Colo. Ct. App. 1982); *State v. Hennigan*, 404 So. 2d 222, 237 (La. 1981); *State v. Olkon*, 299 N.W.2d 89, 103 (Minn. 1980); *State v. Plummer*, 860 S.W.2d 340, 345 (Mo. Ct. App. 1993).

83. *United States v. Font-Ramirez*, 944 F.2d 42, 48 (1st Cir. 1991). *See also* *People v. Rao*, 386 N.Y.S.2d 441, 451 (N.Y. App. Div. 1976) (Titone, J., dissenting) (arguing that it was improper to include in the transcript a description of a declarant’s physical action, even if a consenting participant is available to describe those actions).

The rule that the transcript “should . . . mirror the tape” is a useful, albeit limited, guideline as to what a transcript may contain with regard to the sounds and noises captured in the recording. If sounds are audible in the background, it would be entirely appropriate for the transcript to include them (e.g. “Car horn honking in background”), to help the jury follow where they are in the transcript. But such passages should be restricted to sounds whose natures are readily apparent. It would be particularly improper for a transcript to “explain” sounds if the explanation suggests wrongdoing. Suppose clicking sounds can be heard on the recording of a meeting between an informant and several suspects. If the informant testifies, it is perfectly permissible to ask him, “What was that clicking sound?” and have him answer, “That was defendant Jones loading a clip into his automatic pistol.” But the transcript should read: “clicking sounds,” not “sound of automatic pistol being loaded.”

Likewise, the transcript of the conversation should be limited to what was said, without additional explanation. Assume a defendant is accused of selling drugs to an undercover officer. On the tape of a conversation between them, the defendant is heard counting: “twenty, forty, sixty . . .” When the undercover officer testifies, it is entirely proper to ask her, “What was the defendant counting?” and to have her answer, “He was counting the money I had just handed him.” The transcript, however, should read only, “X: Twenty, forty, sixty” and not “X: Twenty, forty, sixty [counting money].”

Nor should a transcript include creative use of punctuation as a visual hint to the jury that the words spoken have a hidden meaning. Thus, it is improper for a transcript to put quotation marks around certain words that the government claimed were code words used to conceal the illegal nature of the conversation.⁸⁴ It would be equally improper to denote such

84. See, e.g., *United States v. Gonzalez-Maldonado*, 115 F.3d 9, 17 (1st Cir. 1997). In *Gonzalez-Maldonado*, the government’s transcripts had quotation marks around the word “ticket,” which the government claimed referred to money, and “accident,” which allegedly referred to arrest. *Id.* The First Circuit correctly held that this was error:

The quotation marks used in the transcripts submitted to the jury in this case reflect the government’s theory of the case. The government does not claim that there is any audible emphasis or other vocal inflection placed on the marked words that is discernible when listening to the tape and failed, both at trial and on appeal, to offer any legitimate explanation for the quotation marks. We hold that the trial court committed error when it allowed the use of transcripts that contained quotation marks around certain words. It is not enough that the court instructed the jury that only the tapes, and not the transcripts, were evidence. Nor is it enough for the government to subsequently present evidence that the words were code words. The government should not be allowed to bolster its argument by customizing the transcript to reflect its own theory of the case.

words by the use of italics or capital letters.⁸⁵

5. Testing Transcript Accuracy

The less audible and intelligible a recording is, the more important it is for the jury to have access to a transcript of the recording. As the importance of jury access to the transcript increases, so does the question of whether the transcript accurately reflects what the conversants said. Regardless of whether the transcript is regarded only as an “aid to understanding,” or as opinion evidence of the contents of the tape,⁸⁶ it is likely to have a significant impact on the jury.

At some point before or during a trial, a determination should be made as to whether the transcripts to be shown to the jury are accurate. In a criminal case, the initial burden should be on the defense to seek discovery of all recordings and transcripts the prosecutor plans to offer in evidence,⁸⁷ and then to bring a pretrial challenge to those portions of the transcript he or she claims are inaccurate.⁸⁸ Failure to make a timely objection waives the issue.⁸⁹ If objections are raised to the accuracy of particular portions, the judge should attempt to resolve such objections

Id.

85. Some punctuation is of course necessary to communicate the meaning of what was recorded. This inevitably will involve some degree of interpretation by the transcriber. Where the defendant claims that the punctuation included in a transcript unfairly shades its meaning, such issues can be addressed to the court or, under the *Onori* approach, explored on cross-examination of the person who prepared the transcript. When the conversation is in English, the problem of interpretive punctuation is generally a minor one, because when jurors hear the conversation they can interpret for themselves such characteristics as pauses, apparent indecision, inflection, and emphasis.

86. See *supra* Part I.B.2.

87. See, e.g., FED. R. CRIM. P. 16(a)(1)(E) (“[u]pon a defendant’s request, the government must permit the defendant to inspect and to copy . . . papers, documents, data . . . within the government’s possession, custody, or control,” if “the item is material to preparing the defense,” if the government expects to offer it in evidence, or if it was taken from or belongs to the defendant) (emphasis added). Unless the defense requests such material, the prosecution is under no obligation to provide it except for the constitutional obligation to provide defense counsel with exculpatory evidence or information even without a defense request. *Brady v. Maryland*, 373 U.S. 83, 86–87 (1963).

88. See, e.g., FED. R. CRIM. P. 12(b)(3)(E) (mandating that motions for discovery must be made prior to trial); FED. R. CRIM. P. 12(b)(3)(C) (imposing the same requirements on a motion to suppress); FED. R. CRIM. P. 12(c) (authorizing the judge to set deadlines for pretrial motions).

89. See, e.g., *United States v. Brandon*, 363 F.3d 341, 343 (4th Cir. 2004); *United States v. DeLeon*, 187 F.3d 60, 65 (1st Cir. 1999); *United States v. Chiarizio*, 525 F.2d 289, 293 (2d Cir. 1975). Each of these cases holds that it is the defendant’s obligation to challenge the accuracy of the transcripts, and that in the absence of such a challenge, the trial court has no obligation *sua sponte* to review them.

and arrive at a transcript which all parties will stipulate to be accurate.⁹⁰ Although there is little civil case law on the subject, in civil litigation the preliminary steps should follow the same basic pattern.⁹¹

When the parties are unable to resolve objections to the transcript by stipulation, courts are divided on whether the judge or jury should be the final arbiter on what the transcript should contain. Some, following the approach approved by the Fifth Circuit in *Onori*,⁹² hold that each party should present its evidence about the transcript to the jurors, who then decide which version (if either) it will rely on.⁹³ Others give the judge discretion to either decide what the transcript should contain, or to follow the *Onori* approach.⁹⁴ Still others require the judge to determine the contents of the transcript if the parties cannot agree.⁹⁵ Barring the

90. *United States v. Holton*, 116 F.3d 1536, 1540–41 (D.C. Cir. 1997); *United States v. Onori*, 535 F.2d 938, 948 (5th Cir. 1976); *Chiarizio*, 525 F.2d at 293; *United States v. Turner*, 528 F.2d 143, 167 (9th Cir. 1975); *United States v. McMillan*, 508 F.2d 101, 105–06, (8th Cir. 1974); *People v. Polk*, 54 Cal. Rptr. 2d 921, 926–27 (Cal. Ct. App. 1996); *State v. Dominguez-Ramirez*, 563 N.W.2d 245, 250 n.2 (Minn. 1997).

91. In civil litigation, the offering party is obliged to disclose such evidence. *See, e.g.*, FED. R. CIV. P. 26(a)(3)(C) (requiring pretrial disclosure from each party at least 30 days before trial, unless otherwise directed by the court, of “an appropriate identification of each document, or other exhibit, including summaries of other evidence, . . . which the party expects to offer . . .”). Thereafter, the adverse party may bring a motion in limine, per FED. R. EVID. 103(a)(2), seeking to exclude the recording, the transcript, or both, on whatever grounds might apply: that the conversation was recorded unlawfully, or that the recording is inaudible or unintelligible, or that the transcript is inaccurate, etc.

92. 535 F.2d 938, 948 (5th Cir. 1976).

93. *See, e.g.*, *United States v. Hogan*, 986 F.2d 1364, 1376 (11th Cir. 1993). *But see* *United States v. Aisenberg*, 120 F. Supp. 2d 1345, 1347 (M.D. Fla. 2000) (holding that the accuracy of transcripts is “never” for the jury to decide); *Polk*, 54 Cal. Rptr. 2d at 926–27; *State v. Loveless*, 308 N.W.2d 842, 846–47 (Neb. 1981) (plurality opinion). And courts generally acknowledge that the “transcript as aid to listening” rationale simply cannot apply to the translation of a conversation in a foreign language. *See infra* Part II.G.

94. *See, e.g.*, *United States v. Delgado*, 357 F.3d 1061, 1070–71 (9th Cir. 2004); *United States v. Jacob*, 377 F.3d 573, 581 (6th Cir. 2004) (expressing a strong preference that the trial judge determine the contents of the transcript, as first enunciated in *Robinson*, but upholding variations so long as the goal, which “is to provide the jury with transcripts which bear a ‘semblance of reliability,’” is met (quoting *United States v. Robinson*, 707 F.2d 872, 879 (6th Cir. 1983)); *Holton*, 116 F.3d at 1542–43; *United States v. Booker*, 952 F.2d 247, 249–50 (9th Cir. 1991); *United States v. Devous*, 764 F.2d 1349, 1353–55 (10th Cir. 1985) (citing approvingly to *United States v. Slade*, 627 F.2d 293, 302 (D.C. Cir. 1980)); *Robinson*, 707 F.2d at 876–79; *United States v. Bell*, 651 F.2d 1255, 1259 (8th Cir. 1981); *Slade*, 627 F.2d at 302; *People v. Haider*, 829 P.2d 455, 456–57 (Colo. Ct. App. 1991) (citing approvingly to both *Slade* and *Onori*); *State v. Ahmadjian*, 438 A.2d 1070, 1082–83 (R.I. 1981).

95. *McCoy v. State*, 853 So. 2d 396, 402–05 (Fla. 2003). *See also* *People v. Garcia*, 811 N.Y.S.2d 402, 404 (N.Y. App. Div. 2006) (where portions of a defendant’s videotaped statement were difficult to understand because of his speech impediment, and each side produced materially

rare case where the judge is convinced the prosecutor's transcript is essentially bogus,⁹⁶ the *Onori* approach best reflects the appropriate roles of judge and jury.

An additional point on "accuracy" merits mention. Judicial discussion of a transcript's "accuracy," as the preceding text explains, focuses on whether the transcript correctly reflects what the conversants said—e.g., whether *X* said "I'm gonna" or "Ain' gonna." Ideally, however, the offering party should strive for more, and should take every reasonable measure to assure the transcript is as accurate as possible. A transcript made during a criminal investigation, for example, which was quite sufficient for investigative purposes, is not necessarily a good transcript to offer at trial. Investigative transcripts are generally made by police officers, who are primarily interested in getting the gist of the conversation, rather than accurately reflecting every syllable that is said. Moreover, police officers are likely to be less concerned about and less skilled at the nuances of grammar, spelling, homonyms and punctuation than they are at conducting surveillance and anticipating what the targets of the investigation are likely to do next. Before submitting a transcript for distribution to a jury, a prosecutor should review it to assure proper spelling and punctuation. Equally important, the transcript should, to the extent possible, reflect every verbal utterance and stutter that can be heard on the recording—even those which are relatively insignificant. The more accurate the transcript is with regard to portions the jury can hear plainly, the more credibility the jury is likely to give to those portions of the transcript where the recording is difficult to make out⁹⁷—e.g., because of background noise—which is likely to be a matter of some importance where, as is often the case, the subjects of the investigation chose just such circumstances to have their most important conversations.

6. *Expert Testimony Interpreting Conversations*

People who engage in specialized fields tend to develop "terms of art" and informal jargon with meanings that are a mystery to the

differing transcripts of the statement, "the court properly exercised its discretion in excluding both transcripts," because it would be unfair to introduce only one side's version, while submitting competing versions "would have been confusing for the jury").

96. *See, e.g., supra* note 34.

97. Some jurors may be oblivious to or unimpressed by this attention to detail, but if it has a favorable effect on even one or two jurors, the effort will have been worth it.

uninitiated.⁹⁸ Criminals are no exception.⁹⁹ As the Eighth Circuit has observed, “There is no more reason to expect unassisted jurors to understand drug dealers’ cryptic slang than antitrust theory or asbestosis.”¹⁰⁰ The problem is compounded by the fact that criminals often go out of their way to make it difficult for the uninitiated or uninvited listener to understand what they say.¹⁰¹ To complicate matters further, particular groups of criminals who regularly do business together often develop an internal code of their very own.

Thus, to help the jury understand a recorded conversation, it is often necessary to call a witness to explain the terms of art, translate the jargon, and crack the code. A witness who participated in the conversation may give such testimony without qualifying as an expert, because his or her opinion is based on what the witness has personally

98. To non-attorneys, for example, “Establishment Clause” might be taken to refer to Santa’s stodgy older brother, and “free exercise,” a membership promotion at the nearby health club. Consider, for example, what a lay person might make of the terms “in camera,” “under color of law,” and “privy.” For a collection of legal terms of art whose “legal” definitions differ somewhat from how ordinary people understand them, see BRYAN A. GARNER, *THE REDBOOK: A MANUAL ON LEGAL STYLE* § 11.3 (2002).

99. Examples:

“H” is slang for heroin (1930s to the present). JONATHAN GREEN, *THE CASSELL DICTIONARY OF SLANG* 550 (1998).

“Hooker” is slang for prostitute (mid-eighteenth century to the present). *Id.* at 609.

“Ice” as a noun, is slang for jewelry, particularly diamonds. *Id.* at 629.

“Ice” as a verb is slang for “kill” (1940s to the present). *Id.*

“Iceman” was slang for “diamond thief” (1920s–1950s) and is now slang for a paid killer (1970s to the present). *Id.* at 630.

“Maryjane” is slang for marijuana (1920s to the present). *Id.* at 773. (The Oxford English Dictionary also lists “Mary Jane” as a term for marijuana, with the following corroborative entry: “1928 Daily Express 11 Oct. 3 What is Marijuana? A deadly Mexican drug, more familiarly known as ‘Mary Jane,’ which produces wild hilarity when either smoked or eaten.” OXFORD ENGLISH DICTIONARY 371 (2nd ed. 1991).)

“Snow” is slang for cocaine, although it is also sometimes used for heroin, morphine and amphetamine (1910s to the present). GREEN, *supra* at 1106. (In New York City, at least in the 1970s while I was a narcotics prosecutor, “soda” was also a fairly common term for cocaine.—CSF)

The following White House report has a particularly useful and extensive description of street names for drugs, providing local variances (e.g., west coast v. east coast): OFFICE OF NAT’L DRUG CONTROL POLICY, *PULSE CHECK: TRENDS IN DRUG ABUSE* (2002), http://www.whitehousedrugpolicy.gov/publications/drugfact/pulsechk/nov02/pulse_nov02.pdf.

100. *United States v. Delpit*, 94 F.3d 1134, 1145 (8th Cir. 1996) (citation omitted). The Fifth Circuit quoted this passage approvingly after noting that, according to Lewin & Lewin, *The Thesaurus of Slang* (1994), there are 223 terms for marijuana. See *United States v. Griffith*, 118 F.3d 318, 321 & n.3 (5th Cir. 1997).

101. As to accusations that attorneys sometimes do likewise (see *supra* note 98), I can only reply, “Res ipsa loquitur.”

perceived.¹⁰² A nonparticipant, by contrast, must qualify to give expert opinion testimony as to the meaning of a conversation by showing that he or she has specialized knowledge based on training, experience, or both, in the type of crime at issue and in the manner in which such criminals talk to one another.¹⁰³

C. Jury Access to Tapes and Transcripts During Deliberations

Just as recorded conversations often play a dominant role during a trial, so too are they likely to be the focus of jury attention during deliberations, and it is within the trial court's discretion to permit the jury to re-hear recordings if they request it during deliberations.¹⁰⁴

102. See FED. R. EVID. 701; *United States v. De Peri*, 778 F.2d 963, 977 (3d Cir. 1985) (citing FED. R. EVID. 701); *United States v. Russell*, 703 F.2d 1243, 1246, 1248 (11th Cir. 1983) (affirming a trial court's decision to allow an undercover participant to testify as to his understanding that those present during taped discussions intended there to be one scheme, not several, and that each defendant agreed to perform specific tasks); *United States v. Martino*, 664 F.2d 860, 864–65 & n.3 (2d Cir. 1981) (testimony of informant who infiltrated a drug network). See also *United States v. Lizardo*, 445 F.3d 73, 83–84 (1st Cir. 2006) (holding that a member of a conspiracy who is now testifying for the government may explain the meaning, not only of the conversations in which he himself participated, but also conversations among other members of the conspiracy to which he was not a party). Although *Martino* and *Lizardo* do not explicitly refer to Rule 701 or categorize the testimony as “lay witness testimony,” it is clear that in each case the court is relying on the witness's first-hand knowledge of the conversations in which she participated, and her knowledge of the verbal patterns and common understandings among members of the conspiracy.

103. See generally FED. R. EVID. 702, which permits a witness to testify as an expert based on “specialized knowledge.” A substantial body of case law has developed governing expert testimony interpreting criminal jargon, particularly in drug cases. For a detailed discussion, see FISHMAN & MCKENNA, *supra* note 3, § 25:14; 5 CLIFFORD S. FISHMAN & ANNE T. MCKENNA, JONES ON EVIDENCE §§ 41:53–59 (7th ed. Supp. 2006).

104. *United States v. Holton*, 116 F.3d 1536, 1542–43 (D.C. Cir. 1997); *United States v. Hofer*, 995 F.2d 746, 748–49 (7th Cir. 1993); *United States v. Bizanowicz*, 745 F.2d 120, 123 (1st Cir. 1984); *United States v. Scaife*, 749 F.2d 338, 347 (6th Cir. 1984); *United States v. Koessel*, 706 F.2d 271, 275 (8th Cir. 1983); *United States v. Vadino*, 680 F.2d 1329, 1338 (11th Cir. 1982); *United States v. Angelilli*, 660 F.2d 23, 30 n.6 (2d Cir. 1981); *United States v. Zepeda-Santana*, 569 F.2d 1386, 1391 (5th Cir. 1978); *United States v. Alfonso*, 552 F.2d 605, 618 (5th Cir. 1977); *United States v. Turner*, 528 F.2d 143, 167–68 (9th Cir. 1975); *United States v. Cioffi*, 493 F.2d 1111, 1116 (2d Cir. 1974); *Humphrey v. State*, 591 So. 2d 583, 585 (Ala. Crim. App. 1991); *State v. Snowden*, 675 P.2d 289, 291 (Ariz. Ct. App. 1983); *Allen v. State*, 247 S.E.2d 540, 542 (Ga. Ct. App. 1978) (video and audio tapes); *People v. Humley*, 728 N.E.2d 1183 (Ill. App. Ct. 2000); *Linger v. State*, 508 N.E.2d 56, 60–61 (Ind. Ct. App. 1987); *State v. Triplett*, 79 N.W.2d 391, 397 (Iowa 1956) (tape of defendant's confession); *State v. Poulos*, 639 P.2d 477, 479 (Kan. 1982); *State v. Brooks*, 838 So.2d 725, 728 (La. 2003) (videotapes, including audio portion); *State v. Barbo*, 339 N.W.2d 905, 906 (Minn. 1983); *State v. Williams*, 643 S.W.2d 3, 4 (Mo. Ct. App. 1982); *State v. Monroe*, 766 A.2d 734, 736 (N.H. 2001); *State v. Halvorson*, 346 N.W.2d 704, 712 (N.D. 1984); *Pfaff v. State*, 830 P.2d 193, 194–95 (Okla. Crim. App. 1992); *State v. Ahmadjian*, 438 A.2d 1070, 1082–83 (R.I. 1981); *State v. Smith*, 573 N.W.2d 515, 520–21 (S.D. 1998); *Chennault v. State*, 667

Common sense dictates that if a transcript was distributed to the jury during the evidence phase of the trial, it may again be made available when the conversation is replayed during deliberations, and courts have so held.¹⁰⁵ Courts are divided, however, as to whether juror access to recordings and transcripts during deliberations must be in open court in the presence of all parties, or whether jurors may have these items in the jury room.¹⁰⁶

II. FOREIGN LANGUAGE CONVERSATIONS

Each of the issues discussed in Part I as to English language recordings—the audibility and intelligibility of the recordings, and the accuracy and contents of the transcripts—arise as well when the conversation is in a foreign language. Part II first provides an overview of the complications unique to foreign language conversations. It then reviews how courts have, and should, deal with these complications.

A. Complications Unique to Foreign Language Conversations

Because translating from one language to another is far from an exact science, disputes as to the accuracy of the transcription and translation are to be expected. The challenge is particularly acute if participants in the conversation speak the same language but come from different countries. As Winston Churchill supposedly said with regard to English, “Great Britain and America are two countries separated by a common language.”¹⁰⁷ Illustrations of this principle are numerous.¹⁰⁸ The same is

S.W.2d 299, 302 (Tex. App. 1984); *State v. Frazier*, 99 Wash. 2d 180, 187–91, 661 P.2d 126, 130–32 (1983); *State v. Dietz*, 390 S.E.2d 15, 28–29 (W. Va. 1990).

105. *United States v. Jordan*, 223 F.3d 676, 688–89 (7th Cir. 2000); *Holton*, 116 F.3d at 1542–43; *United States v. Rengifo*, 789 F.2d 975, 982 (1st Cir. 1986); *United States v. Williford*, 764 F.2d 1493, 1503 (11th Cir. 1985); *United States v. Robinson*, 707 F.2d 872, 876–78 (6th Cir. 1983); *United States v. Turner*, 528 F.2d 143, 168 (9th Cir. 1975); *Cioffi*, 493 F.2d at 1116; *State v. Mason*, 694 N.E.2d 932, 950 (Ohio 1998); *Commonwealth v. Bango*, 685 A.2d 564, 566 (Pa. Super. Ct. 1996); *Burns v. Commonwealth*, 541 S.E.2d 872, 888 (Va. 2001).

106. See FISHMAN & MCKENNA, *supra* note 3, § 25:38.

107. In an attempt to confirm that Churchill actually said this, I Googled “‘Two countries [etc.]’ & Churchill” and came up with 275 “hits.” The first ten consist of news stories or advertisements which say things like “As Churchill said, . . .” without providing any source. I would have dutifully waded through the next 265 “hits” in the hopes that one of them would authenticate the attribution, but my wife insisted that I help her straighten up the guest room instead.—CSF.

108. If someone from the “across the pond” says, “Bring the grips down on the lift and put them in the boot; don’t forget the pram; check under the bonnet; and take your brolly,” how many people in America would understand that a British family with a small child, who live in an apartment

no doubt true with regard to every multi-national language.¹⁰⁹ Translating a foreign language into English is further complicated by the fact that local and regional variations abound within each country,¹¹⁰ as do dialects, accents, and pronunciations.¹¹¹ Finally, as discussed previously,¹¹² the use of jargon, terms of art, and codes will often complicate matters even further.

Even assuming that both sides' translators agree as to the words that were spoken in the other language, they still might quite reasonably disagree as to how to translate those words into English. A literal translation of such a conversation might be almost meaningless. A translation which does not merely translate but also "interprets" jargon, on the other hand, would be impermissibly suggestive.¹¹³

Where the parties cannot agree on what the translation should contain, the best solution is to leave the matter to the adversary system. Each side should submit its translation to the jury, and it should be left to the jury

building, is planning a trip by car on a rainy day? (In American English, that sentence would read: "Bring the suitcases down on the elevator and put them in the trunk. Don't forget the baby carriage; check under the hood; and take your umbrella.") See 12 THE OXFORD ENGLISH DICTIONARY 91 (2d ed. 1989) ("across the pond" for "the other side of the Atlantic Ocean"); 6 THE OXFORD ENGLISH DICTIONARY 850 (2d ed. 1989) (defining "grip" as meaning what Americans call a suitcase); 8 THE OXFORD ENGLISH DICTIONARY 918 (2d ed. 1989) (defining "lift" as meaning what Americans call an elevator); 2 THE OXFORD ENGLISH DICTIONARY 404 (2d ed. 1989) (defining "boot" as meaning what Americans call the trunk of a car); 12 THE OXFORD ENGLISH DICTIONARY 285 (2d ed. 1989) (defining "pram" ("perambulator") as meaning what Americans call a baby carriage); 2 THE OXFORD ENGLISH DICTIONARY 389 (2d ed. 1989) (defining "bonnet" as meaning what Americans call the hood of a car); 2 THE OXFORD ENGLISH DICTIONARY 578 (2d ed. 1989) (defining "brolly" as what Americans call an "umbrella").

109. For example, in most of the Arabic-speaking world, a particular word simply means, "to look." In Lebanon, however, the word means, "to look through the peephole"; and in Tunisia, the same word means "to fart." Nabil M. Abdel-Al, *Cultural Variations in Arabic*, PROTEUS (Nat'l Ass'n of Judiciary Interpreters and Translators, Seattle, WA), Winter 2005, Volume XIII, No. 4 at 1, 4.

110. For example, if I walk into a store and buy a phosphate and a grinder, what will I do with them—and by the way, where am I? I'll drink the phosphate (a localism for "soda" in southern New Hampshire, eastern New England, and parts of Connecticut and Rhode Island) and eat the grinder (a localism for "hero sandwich" throughout New England except Maine). See Steven Baumholtz, Letter, *Soda by Any Other Name*, N.Y. Times, Oct. 18, 1989, at <http://query.nytimes.com/gst/fullpage.html?res=950DE4D7103AF93BA25753C1A96F948260> (last accessed June 21, 2006); Bert Vaux & Scott A. Golder, *Dialect Survey*, http://cfprod01.imt.uwm.edu/Dept/FLL/linguistics/dialect/staticmaps/q_64.html (last accessed June 21, 2006).

111. To appreciate the problem, picture the difficulties a litigant would encounter in, say, France, or Japan, or Egypt, in which adversaries are contesting the transcription and translation of a conversation between life-long residents of the Bronx, rural Mississippi, and New Hampshire.

112. See *supra* Part I.B.6.

113. See *infra* notes 165–169 and accompanying text.

to decide which (if either) translation it finds persuasive.¹¹⁴ A judge should intervene and impose her view on the matter only if she is convinced that the prosecutor's original language transcript or translation has no defensible basis.¹¹⁵

B. Translation of Foreign Language Conversation as Expert Opinion Evidence

Translating a conversation from another language into English requires "specialized knowledge [that] will assist the trier of fact to understand the evidence."¹¹⁶ Thus, it is governed by the rules regulating expert opinion testimony. American jurisdictions differ somewhat as to the standards governing the admissibility of expert testimony,¹¹⁷ but with regard to the admissibility of a translation of a foreign language conversation, common sense dictates the basic ground rules. First, the offering party must elicit testimony from the witness who translated the conversation that he or she has sufficient proficiency in English and the other language—i.e., that he or she qualifies as an "expert" in both languages—to produce a reliable translation. Second, the translator must testify that he or she used reliable methods and procedures in translating the conversation. If the offering party satisfies these two requirements, the transcript is admissible, unless the adverse party persuades the judge that the translation is nevertheless untrustworthy.¹¹⁸

1. The Translator

The offering party must establish its translation witness's expertise in

114. See *infra* Parts II.B and II.C.

115. See *infra* note 118 and accompanying text.

116. FED. R. EVID. 702.

117. The general subject of how to assess admissibility of expert opinion testimony has, since 1993, been the subject of three U.S. Supreme Court decisions, dozens of state supreme court opinions adopting, adapting, or rejecting the U.S. Supreme Court's lead, an amendment to Federal Rule of Evidence 702, and a radically different amendment to Uniform Rule of Evidence 702, and has generated enough scholarly literature to deforest a large continent. For an overview, see 5 CLIFFORD S. FISHMAN & ANNE T. MCKENNA, *JONES ON EVIDENCE*, ch. 40 (7th ed. Supp. 2006). Fortunately, none of this controversy is particularly relevant to the subject of this article.

118. Applying the principles the U.S. Supreme Court has enunciated regarding expert testimony generally, the trial court's initial focus should be on the translator's credentials, and the principles and methodology he or she employed. *Cf.* *Daubert v. Merrell Dow Pharms., Inc.*, 509 U.S. 579, 595 (1993). But the court may nevertheless exclude his or her translation if its only connection to the underlying data is the witness's "ipse dixit." *Cf.* *Gen. Elec. Co. v. Joiner*, 522 U.S. 136, 146 (1997).

both the foreign language and English and the ability to translate from one to the other.¹¹⁹ If the party fails to provide testimony attesting to the accuracy of the translation, the translation ought not be admitted.¹²⁰ There is little case law discussing precisely what the offering party must show in order to establish that the person who prepared the translation was qualified to do so, but common sense suggests the following. At a bare minimum, the witness must establish that he or she has sufficient proficiency in each language to be able to understand, and be understood by, others who speak or write in each.¹²¹ Evidence of formal education in each language enhances the showing; likewise, evidence that the witness has lived in locations in which each is spoken regularly will strengthen the witness's qualifications. Familiarity with the particular dialect or localisms with which the conversants spoke is of course also useful. Formal training or prior experience in the art of transcribing and translating is another useful credential.

After testifying to his qualifications, the witness explains how he or she transcribed and then translated the conversation. The witness then authenticates both the transcription and the translation, and testifies to their accuracy.¹²² This procedure suffices to secure admissibility of the

119. The Federal Rules of Evidence explicitly recognize this with regard to courtroom interpreters. Federal Rule of Evidence 604 provides: "An interpreter is subject to the provisions of these rules relating to qualification as an expert and the administration of an oath or affirmation to make a true translation." Uniform Rule of Evidence Rule 604 is substantially similar. Florida courts apparently require a translator to certify under oath that he or she will give a truthful and accurate translation of a recorded conversation. *See, e.g., Almodovar v. State*, 925 So.2d 425, 426 (Fla. Dist. Ct. App. 2006) (holding that the absence of such a certification was harmless error where defendant did not challenge the accuracy of the translation).

120. *See, e.g., United States v. Sutherland*, 656 F.2d 1181, 1200–01 (5th Cir. 1981) (observing that "when the transcript contains a translation into English of conversations spoken in a foreign language, the proponent must introduce the testimony of a qualified witness to authenticate and verify the translation," but holding that where two of the three participants to a recorded conversation, although not explicitly testifying to the accuracy of the translation, described the conversation in sufficient detail, the error in admitting the unattested translations was harmless error).

121. *See, e.g., United States v. Gutierrez*, 367 F.3d 733, 735 (8th Cir. 2004) (finding that testimony of a police officer who attested that he was fluent in written and spoken Spanish, that he had worked as an undercover officer on more than a hundred occasions, almost always with Spanish-speaking individuals, that he had communicated regularly with the defendant's coconspirator, always in Spanish, and that they had no trouble understanding each other, "provided a sufficient foundation for the introduction of the transcripts").

122. *See United States v. Rengifo*, 789 F.2d 975, 982–83 (1st Cir. 1986) (observing that the two translators testified that they first transcribed the conversations in Spanish, then translated them into English, and were cross-examined about their knowledge of Spanish, familiarity with different dialects, etc.); *United States v. Chalarca*, 95 F.3d 239, 246 (2d Cir. 1996) (observing that after the

translation, except in the rare case where the trial judge has grave doubts as to the witness's expertise or credibility.

Courts are divided as to whether someone who was a participant in a recorded conversation may later transcribe or translate the conversation. Given that a translation is opinion evidence of the transcriber/translator, there is no inherent reason to reject a translation prepared by a participant in the conversation (e.g., an undercover officer).¹²³ Some courts, however, reject the propriety of permitting a participant in the conversation to prepare the translation. New York's intermediate appellate courts, for example, are sharply divided on this issue. Two such courts permit the practice.¹²⁴ A third, by contrast, has held that it is reversible error to allow an undercover officer's transcribed translation of his own consensually recorded conversations to go to the jury;¹²⁵ that court insists that a recording must be translated by an independent interpreter, who would not be permitted to utilize the officer's translation "while evaluating . . . the audibility of the tape."¹²⁶ Some

recording's clarity was enhanced by filtering out background noise, a court-certified translator transcribed the tape and testified to its contents). See also FISHMAN & MCKENNA, *supra* note 3, § 24:11 n.58.

123. *United States v. Font-Ramirez*, 944 F.2d 42, 47–49 (1st Cir. 1991) (observing that although "[t]he objectivity of the transcriber of a tape obviously bears on the decision whether or not to admit a transcript into evidence," the "touchstone" issue "is the accuracy of the transcript," and holding that, given defendant's failure to offer an alternate transcript or identify specific inaccuracies, it was not abuse of discretion to admit the informant's transcript of his conversation with the defendant, on which an interpreter relied in translating the conversation to English); *Pena v. State*, 432 So. 2d 715, 717 (Fla. Dist. Ct. App. 1983) (holding it was not error to distribute to the jury a translation of a Spanish language conversation prepared by the detective who "made" the recording; it is unclear whether the detective was a participant in the conversation, or merely supervised the recording equipment).

124. *People v. Reynolds*, 595 N.Y.S.2d 451, 452 (N.Y. App. Div. 1993) (holding that preparation of the transcripts of a conversation in Rastafarian Jamaican dialect, unintelligible even to other Jamaicans and therefore equivalent to a foreign language, by an undercover participant rather than by an independent third party, "does not affect the admissibility of either the tapes or the transcripts" (citation omitted)); *People v. Valdez-Rodrigues*, 652 N.Y.S.2d 797, 799–800 (N.Y. App. Div. 1997) (upholding use of a translated transcript prepared by the defendant's erstwhile accomplice, at least where no objection was raised at trial to its use).

125. See *People v. Pagan*, 437 N.Y.S.2d 384, 385 (N.Y. App. Div. 1981) (reasoning that there was too great a risk that the translation might reflect the undercover officer's memory of the conversation, rather than what was recorded on the tapes).

126. *Id.* It appears not to have occurred to the court that the accuracy of the translation of a tape is a factual issue for the jury to decide, and that if the defense sought to challenge the officer's translation, it could have done so by offering an expert witness of its own. *Id.* Moreover, the same court "disapproved" of allowing an official court translator to listen to a tape privately to prepare a translation, apparently insisting upon an in-court translation as the tape is played in court. *People v. Carrasco*, 509 N.Y.S.2d 879, 880–81 (N.Y. App. Div. 1986). To insist that a court interpreter

courts in other states will allow participants to transcribe or translate conversations, but with certain limitations.¹²⁷

Often, a case will involve numerous conversations—a typical wiretap or oral intercept investigation may involve hundreds, even thousands¹²⁸—which were transcribed and translated by several different people over the course of a lengthy investigation. It would be cumbersome, time-consuming, and expensive to insist that the prosecutor call the individual who prepared a particular transcript and translation before the prosecutor is allowed to introduce any given conversation and its translation. Instead, a witness with the necessary qualifications may testify that he has reviewed each of the recordings, transcripts, and translations, and is satisfied that the transcripts and translations are accurate.¹²⁹

One additional point merits mention. A translation that accurately captures the gist of a conversation, and therefore is good enough for investigative purposes, may prove embarrassing if offered as evidence at trial. Minor errors or omissions may cause a jury to doubt whether the translator also cut corners with or misconstrued the essence of what was said.

2. *Methods and Procedures*

The witness must establish that he or she used reliable methods to prepare the translation.¹³⁰ It is probably common for some bilingual

translate the conversation as it is played in open court would impose extremely adverse working conditions on the interpreter: instead of working in a quiet room, perhaps with earphones, with the ability to listen several times to a difficult passage, consult other interpreters and written sources, the interpreter would be forced to “wing it.” Inevitably this would often result in the exclusion of a recording which is reasonably clear and quite capable of being transcribed and translated under reasonable working conditions, and would also often result in a translation which is far less accurate than the interpreter could produce under more reasonable circumstances.

127. *See, e.g.*, *Leal v. State*, 711 S.W.2d 702, 710 (Tex. App. 1986), *aff'd in part and rev'd in part on other grounds*, 782 S.W.2d 844 (Tex. Crim. App. 1989) (expressing a preference that an official translator testify and translate the tape into English). However, in another case, the Texas appellate court also allowed trial judges to accept translations by state witnesses, so long as the latter are subject to cross-examination, the tapes themselves are admitted into evidence, the defense had an opportunity to obtain its own translation, and the judge cautions the jury that the state's translation was not necessarily “authentic.” *Guerra v. State*, 760 S.W.2d 681, 691 (Tex. App. 1988).

128. *See, e.g.*, *United States v. Quintana*, 508 F.2d 867, 873 (7th Cir. 1975) (in a wiretap lasting thirty-five days, some 2000 calls were intercepted, of which 153 were drug-related; the investigation led to indictment of fifteen defendants).

129. *United States v. Gutierrez*, 367 F.3d 733, 735 (8th Cir. 2004).

130. *See* FED. R. EVID. 702:

witnesses to prepare an English translation directly from the foreign language recording. While this method should not require exclusion of the translation, it nevertheless should be discouraged. It is far more preferable for the witness first to transcribe the conversation in the language in which it was spoken and then to prepare a translation from the transcript.¹³¹ This is so because preparing such a translation requires two steps: first, determining what was said in the other language, and second, translating that into English. Requiring the witness to focus on each step separately increases the likelihood that each step is performed accurately. Moreover, it facilitates the process whereby the adverse party may challenge, and a judge and jury can evaluate, the accuracy of the translation.

The offering party's witness should be permitted to consult dictionaries, web sites, and people who speak the foreign language, or who are bilingual, before arriving at a final transcription and translation. Each of the professional translators with whom I have spoken agree that this is highly recommended and, indeed, standard practice whenever possible. Thus, this practice is consistent with rules governing expert

If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise, if (1) the testimony is based on sufficient facts or data, (2) *the testimony is the product of reliable principles and methods, and (3) the witness has applied the principles and methods reliably to the facts of the case.*

(emphasis added). *See also* *Daubert v. Merrell Dow Pharms., Inc.*, 509 U.S. 579, 595 (1993) (stressing the importance of assessing the “principles and methodolog[ies]” applied by the expert); *Gen. Elec. Co. v. Joiner*, 522 U.S. 136, 146 (1997) (affirming the importance of these factors, while recognizing that the trial judge must also assess whether the expert’s application of those principles and methodologies to the facts at hand adequately support the expert’s conclusions); *Kumho Tire Co. v. Carmichael*, 526 U.S. 137, 147–53 (1999) (holding that the rules enunciated in *Daubert* and *Joiner*, each of which involved scientific evidence, also apply to expert testimony not based on science, so long as the witness demonstrated sufficient knowledge, skill, experience, training, or education to satisfy the requirements of Rule 702 of the Federal Rules of Evidence).

131. At least two organizations of courtroom-oriented interpreters and translators are in the process of drafting proposed standards. Each would require that the translator first produce a transcript in the spoken language, and then prepare a written translation into English. *See, e.g.*, the training manual produced by the Joint Language Training Center (JLTC), Camp Williams State Military Preserve, Riverton, Utah (The JLTC is a program which includes members of the United States Army and Air Force and transcribers and translators employed by various law enforcement agencies in the Salt Lake City area.) (on file with author); Letter from Ann G. McFarlane, Executive Dir., Nat’l Ass’n of Judiciary Interpreters and Translators, to author (June 30, 2005) (on file with author). Each organization urges that the document be prepared in two columns, with the original language transcription on the left and the English translation on the right. “The two-column format allows for drawing a clear correlation between the original statement taken down in the transcription and the resulting translation, which is extremely useful in a trial setting if questions arise regarding accuracy of translation.” *Id.*

testimony generally.¹³²

C. Adverse Party's Challenge to Transcript Accuracy

Once the offering party satisfies its burden of production as to the translation's accuracy, the burden shifts to the adverse party to challenge the offering party's showing.¹³³ If the adverse party does not do so, inaccuracy or bias should not be presumed.¹³⁴ Accordingly, several federal circuit courts have refused to consider appellate challenges to the accuracy of a prosecutor's transcript or translation where the defense neither submitted its own translation to the trial judge nor called the trial judge's attention to specific inaccuracies in the prosecutor's translation.¹³⁵

132. See FED. R. EVID. 703, which provides:

The facts or data in the particular case upon which an expert bases an opinion or inference may be those perceived by or made known to the expert at or before the hearing. *If of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject, the facts or data need not be admissible in evidence in order for the opinion or inference to be admitted.* Facts or data that are otherwise inadmissible shall not be disclosed to the jury by the proponent of the opinion or inference unless the court determines that their probative value in assisting the jury to evaluate the expert's opinion substantially outweighs their prejudicial effect.

(emphasis added). Uniform Rule of Evidence 703 is substantively identical.

133. See, e.g., *United States v. Armijo*, 5 F.3d 1229, 1234–35 (9th Cir. 1993) (holding that the district court did not err in admitting the government's translation where the defendant did not submit his own translation or present an expert to contest the transcript's accuracy); *United States v. Font-Ramirez*, 944 F.2d 42, 47 (1st Cir. 1991) (noting that “[a]fter the government lays a foundation for the admission of a tape, the party challenging the recording bears the burden of showing that it is inaccurate” (citation omitted)); *United States v. Rosenthal*, 793 F.2d 1214, 1238 (11th Cir. 1986) (noting that “[i]f the government's translation was inaccurate, it was petitioner's burden to challenge its accuracy by presenting another translation, so that the jury could choose which version to believe” (quoting *United States v. Llinas*, 603 F.2d 506, 509 (5th Cir. 1979))).

134. See, e.g., *Font-Ramirez*, 944 F.2d at 48 (noting that “[b]ecause [the defendant] did not offer an alternative transcript and did not point out any specific inaccuracies in the government's transcript, the district court was within its discretion in allowing its use”).

135. See, e.g., *United States v. Gutierrez*, 367 F.3d 733, 736 (8th Cir. 2004) (noting that since the defendant “failed to allege that the transcripts were inaccurate, he cannot show that he suffered prejudice as a result of the instruction given by the district court”); *United States v. Franco*, 136 F.3d 622, 626 (9th Cir. 1998) (holding that where the defendants did not submit a competing translation, the defendants did not put the accuracy of the transcripts sufficiently in issue for appeal); *United States v. Zambrana*, 841 F.2d 1320, 1337–38 (7th Cir. 1988) (“Because the defendant had ample opportunity not only to challenge the accuracy of the government's transcript through cross-examination and expert testimony, but also, if he so desired, to present his own transcript, we hold that the defendant's challenge to the district court's decision to allow the jury to use the government's transcript as an aid to listening to the taped conversations is without merit.”); *United States v. Cruz*, 765 F.2d 1020, 1023 (11th Cir. 1985) (“The district court . . . offered Cruz an opportunity to submit his own [translation]. Cruz's failure to make use of this opportunity was a

The timing of the adverse party's challenge is also a significant factor. Translation issues should be resolved before trial whenever possible, because, once the jury has been seated and the trial has begun, the offering party may not have time to take corrective action on the translation. This is particularly important in criminal cases because, once jeopardy has attached, the prosecutor cannot appeal an adverse ruling. Thus, so long as the adverse party has had timely access to the recording and translation, the trial court should require that party to bring such inaccuracies and possible bias to the court's attention prior to trial.¹³⁶

When the party that introduces the recording offers its translation at trial, its expert is subject to cross-examination by the adverse party. Such cross-examination can take a variety of approaches, including, among others, the following.¹³⁷ (1) If the conversation was transcribed by one person and translated by someone else, any weaknesses exposed in the former's testimony can be reiterated during cross-examination of the latter.¹³⁸ (2) Evidence that a witness is biased or has a motive to shade his testimony for or against one party is always relevant.¹³⁹ This is particularly true in criminal cases,¹⁴⁰ but is also true in civil litigation.¹⁴¹

deliberate tactical decision. Cruz 'cannot complain on appeal that the jury's fact-finding function was usurped when he failed to present evidence which would have aided the jurors in fulfilling that function.'" (quoting *United States v. Llinas*, 603 F.2d 506, 510 (5th Cir. 1979)).

136. See *Font-Ramirez*, 944 F.2d at 47 (noting that "[t]he preferable method for challenging the tape is through a pre-trial suppression hearing"). But see *United States v. Gonzalez*, 365 F.3d 656, 660 (8th Cir. 2004), *vacated on other grounds and remanded* by 125 S. Ct. 1114 (2005) (noting that "[s]o long as [the defendant] was given the opportunity to challenge the government's translations, the timing of that challenge is left to the discretion of the district court"); *Armijo*, 5 F.3d at 1234-35 (refusing to fault a trial judge who did not at any point review the accuracy of the government's translation, where defendant had pretrial access to the recording and the government's translation but brought no pretrial challenge to its accuracy); *Sparkman v. State*, 902 So.2d 253, 258 (Fla. Dist. Ct. App. 2005) (holding that defense counsel's failure to bring a pretrial challenge to aspects of a recording and transcript, despite the *prosecutor's request* that counsel do so, did not justify the trial court's ruling that counsel waived the issue, where the *court* had not *required* that such objections be made prior to trial).

137. The examples offered in this paragraph are based primarily on my eight years' experience as a trial lawyer and thirty years' experience as an evidence professor.

138. "You did not yourself listen to the conversation, did you?—You relied solely on the written transcript prepared by witness X, correct? So if X made any mistakes in transcribing the conversation in [the foreign language], those mistakes would of course appear as well in your translation, wouldn't they?"

139. See, e.g., *United States v. Abel*, 469 U.S. 45, 52 (1984) ("Bias is a term used . . . to describe the relationship between a party and a witness which might lead the witness to slant, unconsciously or otherwise, his testimony in favor of or against a party.").

140. The U.S. Supreme Court has held as a general matter that in criminal cases, a defendant's right to offer evidence from which defense counsel can argue bias or motive to lie often trumps

Where the facts make it appropriate, the cross-examiner can suggest that the witness who transcribed or translated a conversation favored the party offering the transcription or translation in evidence.¹⁴² (3) Counsel can expose and exploit differences between earlier drafts of the offering party's transcript or translation and the version offered at trial, particularly if each subsequent version became more favorable to the offering party.¹⁴³ (4) Where the adverse party's expert has identified what he or she believes are specific errors in the offering party's transcription or translation, counsel can question the offering party's witness about each.¹⁴⁴ Just as, in an English conversation, a dispute might arise as to whether a person said "I'm gonna" or "Ain' gonna," so too, for example, people fluent in Spanish might disagree as to whether a person said "roja" ("red"), "ropa" ("clothing") or "roca" ("rock")—which could be quite significant, particularly if the government claims

other rules that would otherwise exclude the evidence. *See Davis v. Alaska*, 415 U.S. 308, 315–18 (1974) (holding that defendant's right to confront and cross examine state witnesses, guaranteed by the Sixth and Fourteenth Amendments, mandated that defendant be permitted to bring out a state witness's juvenile delinquency adjudication for burglary and resultant probation, as a basis to argue that the witness therefore might have hastily identified the defendant as the man he saw in connection with an unrelated burglary, for fear that otherwise the police would suspect him, despite a state statute protecting juveniles from public disclosure of such adjudications); *Olden v. Kentucky*, 488 U.S. 227, 231–32 (1988) (holding that it was reversible error to preclude a rape defendant from eliciting that the complainant, a white married woman, was having an affair with, and living with, an African American man (not her husband) at the time of the incident, despite the state court's concern that the evidence might be "extreme(ly) prejudicial" to the complainant, because the information provided a basis for defendant to argue that the complainant falsely accused him of rape out of concern that her boyfriend might spurn her if he learned that she had consented to have sex with defendant); *Abel*, 469 U.S. at 56 (holding that evidence that a defense witness belonged to a "secret prison organization" that required its members to lie for one another, was admissible despite FED. R. EVID. 608(b), which generally precludes impeaching a witness with extrinsic evidence of prior acts of untruthfulness).

141. *See, e.g.*, 2 CLIFFORD S. FISHMAN & ANNE T. MCKENNA, *JONES ON EVIDENCE* § 9:27 (7th ed. 1994) (in negligence cases, a plaintiff may elicit that a defense witness is paid by the defendant, to suggest the witness is biased for or is interested in furthering the defendant's case); *id.* (Supp. 2006) (discussing the application of this principle in medical malpractice suits). Bias in civil actions may arise in a variety of other contexts as well. *See, e.g.*, *Cissel v. W. Plumbing and Heating, Inc.*, 612 P.2d 206, 210–211 (1980) (admitting evidence that witness who testified for the plaintiff did so because the plaintiff threatened to kill the witness).

142. *Compare Font-Ramirez*, 944 F.2d at 48 (observing that a transcriber's bias is a factor in assessing the admissibility of a transcript).

143. *See, e.g.*, *United States v. Armijo*, 5 F.3d 1229, 1234–35 (9th Cir. 1993) (noting that defense counsel used this tactic).

144. *See, e.g.*, *United States v. Franco*, 136 F.3d 622, 628–29 (9th Cir. 1998) (noting that defense counsel cross-examined the government's translator as to why she translated "458" as a number rather than as a time of day).

that the word that was spoken is slang or code for illegal activity.¹⁴⁵ (5) Similarly, counsel, relying on information provided by his or her own expert, could ask the offering party's expert about alternate translations of a particular word or phrase.

After the offering party rests, the adverse party can call its translator. Like the offering party, the adverse party must first elicit testimony that establishes its witness's qualifications.¹⁴⁶ The adverse party may then have that witness critique the offering party's transcript,¹⁴⁷ and offer its own transcript.¹⁴⁸

D. Assessing Accuracy: Roles of Judge and Jury

As a general rule, a judge is not authorized to exclude expert testimony merely because the judge disagrees with the expert's conclusions.¹⁴⁹ Rather, the judge's role is limited to assessing the witness's qualifications, the principles and methods the expert applied to the data at hand, and whether there is a reasonable basis for the expert's

145. See 2 COMMUNITY EPIDEMIOLOGY WORK GROUP, NAT'L INST. ON DRUG ABUSE, EPIDEMIOLOGIC TRENDS IN DRUG ABUSE 151 (2002), http://www.drugabuse.gov/PDF/CEWG/Vol2_1202.pdf (referring to the term "roca" as Spanish slang for crack cocaine).

146. See *supra* Part II.B.1.

147. In *United States v. Zambrana*, a defense expert testified that "there were a lot of errors" in the government's transcript and translation:

They were vocabularies that were mistranslated. There were a lot of areas that said unintelligible, but it really was intelligible. There [sic] completely wrong constructions in terms of putting words that weren't there and omitting the words that were there and so, you know—it's difficult. I'm not saying that—they are hard to listen to, and it's—and you have—it's very rapid speech. It's a phone conversation, so you don't get the benefit of looking at a person in the face. You have all kinds of difficulties. I can understand that people would make a mistake in transcribing these.

841 F.2d 1320, 1336 (7th Cir. 1988). On the other hand, *Zambrana* also illustrates that calling such a witness has its risks, because on cross the defense expert verified that in many instances the government's translations of key phrases were correct. *Id.* at 1336–37.

148. *United States v. Ademaj*, 170 F.3d 58, 65–66 (1st Cir. 1999) (observing that because the defendant failed to offer a "sufficient objection" to the government's translation of conversations in Greek and also failed to offer an alternative translation, it was no abuse of discretion for the trial judge to authorize use of the government's "duly authenticated" translation at trial and during jury deliberations "subject to an appropriate cautionary instruction"); *Franco*, 136 F.3d at 626 (approving the trial court's instruction to the defense to submit its own "competing translations of disputed passages," and its conclusion that, given the defendants' failure to do so, the accuracy of the government's translations had not been placed in issue).

149. See, e.g., *Deputy v. Lehman Bros. Inc.*, 345 F.3d 494, 506–08 (7th Cir. 2003) (holding that the trial judge committed reversible error in excluding a handwriting expert's opinion based on the judge's assessment of the expert's "credibility and persuasiveness").

opinion.¹⁵⁰ Assuming the proponent satisfies this test, it is up to the adverse party to challenge that expert on cross-examination, to offer its own expert witness, or both.¹⁵¹

Applying these principles to a translation of a foreign language recorded conversation, the judge's role should be limited to assessing whether the offering party has satisfied the standards set out in the previous paragraph.¹⁵² A translation is sufficiently accurate if it "reasonably conveys the intent or idea of the thought spoken."¹⁵³ If reasonable people could disagree as to whether the recording contains the words written out in that party's proffered transcript and as to whether those words mean what appears in that party's proffered translation, the judge should admit the translation, and let the jury decide on the accuracy of the transcription and translation.

This is not to suggest that the trial judge's role must be totally passive. Where the adverse party contests the accuracy of a few crucial passages, the trial judge should urge the parties to attempt to arrive at a transcription and translation that both sides can stipulate is accurate.¹⁵⁴ As part of this effort, it might be worthwhile for the judge to seek the assistance of someone (such as a court interpreter) who is identified with neither party and is therefore less likely to be influenced by a subconscious desire to help one side or the other.¹⁵⁵ If this neutral witness can persuade both parties to accept a particular translation, so much the better. Where (as will often occur) no such agreement is

150. See *id.* (noting that the trial judge's role in assessing expert testimony is limited to evaluating the "reliability" of the expert's principles and methods and application thereof).

151. *Daubert v. Merrell Dow Pharms., Inc.*, 509 U.S. 579, 596 (1993) (stating that "[v]igorous cross-examination, presentation of contrary evidence, and careful instruction on the burden of proof are the traditional and appropriate means of attacking shaky but admissible evidence").

152. See *supra* note 150 and accompanying text.

153. *United States v. Zambrana*, 841 F.2d 1320, 1337 (7th Cir. 1988).

154. See *United States v. Font-Ramirez*, 944 F.2d 42, 48 (1st Cir. 1991) (noting that "[i]t is advisable for a trial judge to obtain a stipulated transcript"); *United States v. Llinas*, 603 F.2d 506, 509 (5th Cir. 1979) (noting that the court and the parties should make an initial effort to stipulate to a transcript that satisfies all sides); *United States v. Gonzales*, 365 F.3d 656, 660 (8th Cir. 2004), *vacated on other grounds*, 543 U.S. 1107 (2005) (noting that "like our sister circuits, we believe that whenever the parties intend to introduce a transcript at trial, they should first try to produce an official or stipulated transcript, one which satisfies all sides" (internal citations omitted)). It may often occur, however, that defense counsel in a criminal case will not stipulate to the accuracy of the government's translation for the simple reason that doing so could be tantamount to stipulating to the defendant's guilt.

155. See FEDERAL JUDICIAL CENTER, REFERENCE MANUAL ON SCIENTIFIC EVIDENCE 67 (2d ed. 2000) (noting "the broader inherent authority of the court to appoint experts who are necessary to enable the court to carry out its duties").

reached, however, the judge should not automatically accept this neutral court-appointed witness's conclusions as determinative, since that expert's ability to translate the conversation accurately is subject to the same standards as the other experts.

Where the parties are unable to stipulate to a transcript or translation, the issue becomes a matter of fact that is best left to the jury. Assuming the offering party's translation meets the standard discussed earlier,¹⁵⁶ if the adverse party disputes what the conversants said or what their words mean in English the ultimate trier of fact should resolve the dispute. When the offering party introduces its translation into evidence, its expert is subject to cross-examination by the adverse party.¹⁵⁷ The adverse party may also offer its own transcript.¹⁵⁸ As each translation is admitted into evidence, the trial judge should give an appropriate instruction.¹⁵⁹

E. Contents of Translations to be Presented to the Jury

The principles governing issues such as voice identification, description of sounds on the transcript, and the exclusion of explanatory material, discussed earlier with regard to a transcript of an English language conversation,¹⁶⁰ apply equally to a translation of a foreign language conversation. Slang and code words, however, pose unique issues with regard to translations of foreign language conversations. Should the translation be literal? Or should it translate idioms and colloquialisms to more accurately reflect what the speakers presumably meant? Should the translator interpret code words and jargon to give an opinion about what the participants were actually communicating to each other?

Anyone who has ever attempted to learn a foreign language quickly realizes that a translation should not be literal: to translate a colloquial expression literally will often produce something that makes little or no sense¹⁶¹ and will sometimes produce a result that makes some sense—

156. See *supra* Part II.B.2.

157. See *supra* notes 137–145 and accompanying text.

158. See *supra* note 148 and accompanying text.

159. See discussion of jury instructions *infra* Part II.G.

160. See *supra* Part I.B.4.

161. Consider the following passage from Nabil M. Abdel-Al:

Libyans . . . say: [an Arabic phrase] which literally translates to “in the year of fenugreek.” The Egyptian equivalent to that is [an Arabic phrase which literally translates to] “in the apricot.” Neither of these two variants means anything if interpreted literally. A non-Libyan or non-

but in a very different way than what was intended.¹⁶² Courts recognize this reality. As the Eighth Circuit commented in a 2004 decision, *United States v. Gonzalez*.¹⁶³ “Generally, transcripts of translated conversations need not be verbatim. In the case of slang terms or idioms which are widely used and understood by the native speakers of the foreign language, translators are allowed to provide nonliteral translations so that the foreign term or phrase makes sense in English.”¹⁶⁴ The court in *Gonzales* recognized, however, that a distinction must be made between slang or colloquial expressions, on the one hand, and a specialized code developed by a particular group of criminals, on the other.¹⁶⁵ The government’s translation in that case rendered the Spanish words “mosca” and “tontas” as “money” and “tons,” respectively, when their literal meanings are “fly” and “dummies.”¹⁶⁶ The court was, correctly, highly critical:

[I]n the case at bar we are not dealing with the translation of common slang terms or idioms. The government’s theory at trial was not that “mosca” (“fly”) and “tontas” (“dummies”) are generally used by Spanish speakers to mean “money” and “tons.” Rather, the government’s theory was that Gonzalez and his cohorts used those meanings to facilitate communication in

Egyptian Arab would be baffled, but these expressions are the equivalent of “in your dreams” or “when pigs fly.” The Libyan expression is derived from the fact that they do not grow fenugreek. Thus, the connotation is “if the impossible happens.”

NABIL M. ABDEL-AL, *supra* note 109, at 4.

162. It was my responsibility once as vice president of my synagogue to inform the congregation at the end of Sabbath services of the many disruptions and dislocations we would face during construction of a new wing. After spelling out the details, I summed up: “Things will be inconvenient for awhile, but, after all,” and then concluded with a (literal) Hebrew translation of a common English expression. Like most of my fellow congregants, I’m pretty good at prayer book Hebrew but, alas, do not actually speak the language. Those who were fluent in Hebrew, on the other hand, had a hard time restraining themselves. I found out later that what I had told the congregation, in contemporary Hebrew, was: “. . . but after all, you can’t make an omelet without busting balls.”

163. 365 F.3d 656 (8th Cir. 2004), *vacated on other grounds*, 543 U.S. 1107 (2005).

164. *Id.* at 660 (internal citations omitted). *See also* *United States v. Garcia*, 20 F.3d 670, 673 (6th Cir. 1994) (noting approvingly that “[t]hrough the translation is not purely literal, the expert stated that it departs only so idioms and other forms of speech make sense in English”); *United States v. Zambrana*, 841 F.2d 1320, 1337 (7th Cir. 1988) (noting that “[i]t is axiomatic that a translation of most foreign languages to English (and vice versa) can never convey precisely and exactly the same idea and intent comprised in the original text, and it is unrealistic to impose an impossible requirement of exactness before allowing a translation to be considered by a jury” (internal citations omitted)).

165. *Gonzalez*, 365 F.3d at 660–61.

166. *Id.* at 660.

their covert drug operations. The problem is that the government's transcript suggested that these words literally mean something they do not.

Although it is unnecessary for a translator to take the intermediate step of providing a literal translation of common slang terms or idioms, we believe more precision is required when dealing with alleged drug code in criminal trials. The potential for prejudice is too great in the latter situation.¹⁶⁷

To relate to the jury what the government claimed the conversants really meant, the court instructed, the translator or some other witness must establish that he or she is qualified as a "drug code expert" in order to testify to his or her opinion regarding the contextual meaning of the word.¹⁶⁸ Further, the court noted that "[l]ike all expert testimony, this opinion will be subject to attack on cross-examination and by the introduction of opposing opinions from other qualified experts."¹⁶⁹

Even where an everyday word has a widely recognized secondary meaning within a criminal milieu, it is better to translate it as the former, not the latter. Consider, for example, the Spanish word for lard, "manteca," which, in at least some parts of the Latino world, is also a well-known slang expression for heroin.¹⁷⁰ Even where it is obvious in context that "manteca" is being used to describe an illicit substance, not lard, the translator should translate it as "lard." To translate it as "heroin" could mislead the jury into believing that the conversants were far more explicit than they actually were.

How such a term is translated can also have a significant tactical impact. If "manteca" is translated as "heroin," this provides defense

167. *Id.* at 660–61 (citations omitted) (citing *United States v. Rena*, 981 F.2d 765, 769 (5th Cir. 1993)).

168. *Id.* at 660, 661 n.2 ("Unlike commonly used slang terms and idioms, drug code is presumably known and understood by only a small segment of the population. Thus, it is not appropriate to presume, without laying a foundation, that a translator is qualified to give opinions relating to alleged drug code.").

169. *Id.* at 661.

170. "Manteca" is so listed at OFFICE OF NAT'L DRUG CONTROL POLICY, PULSE CHECK: TRENDS IN DRUG ABUSE 28 (2002), http://www.whitehousedrugpolicy.gov/publications/drugfact/pulsechk/nov02/pulse_nov02.pdf. And I am informed that "heroin" is listed as one of the definitions of "manteca" in JOSEFINA A. CLAUDIO DE LA TORRE, *DICCIONARIO DE LA JERGA DEL ESTUDIANTE UNIVERSITARIO PUERTORRIQUEÑO* 154 (San Juan: Editorial de la Universidad de Puerto Rico 1989). See e-mail from Dagoberto Orrantia, professional interpreter and translator and member of the Nat'l Ass'n of Judiciary Interpreters and Translators, to author (May 30, 2005) (on file with author).

counsel with a basis to attack the translator's integrity.¹⁷¹ Translating the term as "lard," by contrast, gives the prosecutor an opportunity to drive home the point that the conversants were using drug traffic jargon.¹⁷²

F. Presenting Conversations and Translations to the Jury

Courts have struggled over the most appropriate way to present recorded foreign-language conversations and translations to the jury. Should the recordings be played at all? If not, what alternatives are available? In addition, issues sometimes arise as to the applicability of specific statutes.

1. Should the Recording be Played for the Jury?

Where a recorded conversation is entirely or substantially in English, the preferred, and prevailing, practice is to distribute copies of the transcript or project the transcript on a screen for the jury.¹⁷³ This

171. Imagine: "Officer, are you telling this jury that if a housewife walks into a shop and asks the clerk for a kilogram of manteca, she is a heroin dealer?"

172. Picture this scenario: A prosecutor calls the government's translator as a witness, establishes the witness's credentials, elicits testimony as to how the transcript and translation were prepared, authenticates them, and introduces them into evidence. The direct examination (which the prosecutor and witness have carefully rehearsed beforehand) continues:

Q: . . . Now, on page 3, line 7 of the translation, Guillermo says, "He still owes me 27 for the kilo of lard I sold him last week." Do you see that?

A: I see it.

Q: What is the Spanish word that you have translated as "lard"?

A: "Manteca."

Q: "Manteca." Does that word have any well-recognized secondary meanings?

A: Yes, "manteca" is often used among drug dealers to mean "heroin."

Q: "Manteca" is often used to mean "heroin"! How do you know that?

[The government witness cites Spanish language dictionaries, a White House web site of frequently used drug jargon, and conversations he has had with undercover officers, informants and other translators.]

Q: You consulted dictionaries, web sites, other people. . . . Is that normal procedure?

A: Yes, sir, it is standard operating procedure.

If the witness is particularly well prepared, he or she will then cite to specific provisions in an instruction manual, textbook, or the like, confirming that this is standard operating procedure among professional translators.

Q: The prosecutor looks meaningfully at the jury and asks: "And each of these sources say that 'manteca' is often used to mean 'heroin'?"

Later, another witness testifies that the price of heroin at that particular time ranged from, say, \$25,000 to \$30,000 per kilogram. During closing argument, the prosecutor scornfully and sarcastically refers to "that \$27,000 kilogram of 'lard.'"

173. See *supra* Part I.B.

practice allows the jury to read the transcript as they listen to the recording. Jurors are able to assess whether the transcript is accurate and to hear the participants' tone of voice, inflection, etc.—which can greatly assist a listener in evaluating what each speaker is attempting to convey.

Where the conversation is in a foreign language, on the other hand, it is usually best to distribute the translations to the jury without playing the recording for them.¹⁷⁴ There are several reasons. First, conversations in a foreign language will be incomprehensible to jurors who do not speak that language. Those jurors, therefore, would not be able to evaluate the accuracy of a direct transcription of the conversation, let alone the accuracy of the translation.¹⁷⁵ Second, while hearing the actual conversation helps jurors to understand each declarant's meaning if the conversation is in English, a juror's ability to do so with regard to a conversation in a foreign language, at least without expert assistance, is highly questionable.¹⁷⁶ Distributing a translation without playing the recording will prevent jury attempts to rely on inflections and emphases in the foreign language that they do not understand.¹⁷⁷ Third, playing the

174. Doing so does not violate the “best evidence rule.” See FED. R. EVID. 1002. That rule, as applied to recordings and transcripts, mandates that a party seeking to introduce a transcript (or translation) of a recorded conversation must produce the recording (or explain its absence) before secondary evidence such as a transcript may be admitted. See *supra* Part I.B.3. As discussed earlier, the rule was created as a safeguard against mistake or fraud. By producing the original recording, the offering party satisfies the purposes underlying the rule: the adverse party can examine the recording for alterations and have its own expert evaluate the offering party's transcript and translation. The rule does not, however, mandate that the recording be played to the jury as a prerequisite to distribution of a translation of the conversation, where doing so would serve no useful purpose, or would create a risk of confusing or misleading the jury. See FED. R. EVID. 403 (directing that, “[a]lthough relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of . . . confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence”). As I argue in the text immediately following this note, as a rule, listening to a recording of a foreign language conversation will have little or no probative value to jurors who do not speak the language, will waste time, may mislead or confuse the jury, and may create additional problems as well.

175. *United States v. Estrada*, 256 F.3d 466, 472–73 (7th Cir. 2001) (noting that “the district court saw no value in allowing a presumably English speaking jury to hear tapes that were recorded in Spanish. It is difficult to second-guess such a decision”); *United States v. Franco*, 136 F.3d 622, 626–29 (9th Cir. 1998); *United States v. Bahadar*, 954 F.2d 821, 829–31 (2d Cir. 1992).

176. *United States v. Grajales-Montoya*, 117 F.3d 356, 367 (8th Cir. 1997) (noting and affirming the trial court's reasoning that a jury member who was not proficient in Spanish was not likely to “discern relevant inflections and idiosyncrasies”).

177. As the Eighth Circuit observed in *Grajales-Montoya*, “[Defendant] has suggested no reliable means of enabling people who do not speak Spanish to interpret inflections and tone, and we cannot think of any, either.” *Id.* See also *Franco*, 136 F.3d at 629 (upholding the district court's ruling that inflections and emphasis in a foreign language would not be enlightening and could be misleading

conversation can create a substantial problem if some, but not all, of the jurors speak the language in question. The bilingual jurors would become, in essence, expert “witnesses” who, because they share their interpretations (which may not be accurate) with fellow jurors in the jury room rather than on the witness stand, cannot be cross-examined by the adverse party.¹⁷⁸ Although playing the recording to a partially bilingual jury is not by itself reversible error,¹⁷⁹ the risks of doing so seem to outweigh the questionable benefits.

In some circumstances, however, playing at least a portion of a conversation for the jury may be useful, and perhaps even necessary to assure a fair trial. First, doing so might be useful where disputes exist as to the identification of voices or the audibility or intelligibility of the recording. Assume for example in a criminal case, that one conversation consists of a phone call made to a phone listed in defendant *X*’s name. A man answers the call and identifies himself as *X*, and, during the conversation, mentions his wife and children by name, talks about the

to the jury); *Estrada*, 256 F.3d at 472–73 (upholding the district court’s “apparent” determination that there was “no value in allowing a presumably English speaking jury to hear tapes that were recorded in Spanish”). *But see* *United States v. Cruz*, 765 F.2d 1020, 1024 (11th Cir. 1985) (“The district court played the tape recording for the jury and had an interpreter signal the jury when it was appropriate to turn the pages of the transcript. This procedure enabled the jury to detect changes in voice modulation and note any hesitations or other characteristics which might give meaning to the tape recording.”).

178. *See* *People v. Cabrera*, 281 Cal. Rptr. 238, 240 (Cal. Dist. Ct. App. 1991) (holding that it was reversible error for a juror, during jury deliberations, to retranslate an expert witness’ translation of a conversation). *But see* *Hernandez v. State*, 938 S.W.2d 503, 507–08 (Tex. Crim. App. 1997) (holding that because the defendant failed to produce the juror’s translation, he failed to demonstrate that discrepancies existed between the official and the juror’s translation, and therefore failed to establish that the juror improperly introduced new evidence during deliberations). In *Hernandez*, it seems strange to fault the defendant for failing to produce a translation which, for all we know, may have been verbal, not written, or which, if written, may have been discarded by the jurors after they announced their verdict, long before the defendant ever knew it existed.

179. *See* *United States v. Rodriguez*, 63 F.3d 1159, 1167 (1st Cir. 1995) (holding that the presence of some Spanish words on a recorded conversation between defendant and a drug agent posed no bar to admissibility, despite defendant’s claim that some jurors might have acted as interpreters for other jurors); *United States v. Rivera*, 778 F.2d 591, 600 (10th Cir. 1985) (holding that the trial court did not abuse its discretion by allowing jurors, one of whom spoke Spanish, to access recordings where there were no indications of impropriety). Similarly, courts have held that the presence of bilingual jurors does not require withholding recordings or translations from the jury during deliberations. *See id.* at 600 (noting that “[i]ndividual jurors bring different skills and backgrounds to the deliberations of juries in most cases. The circumstances involved here are not indicative of any impropriety”); *United States v. Lam Lek Chong*, 544 F.2d 58, 71 (2d Cir. 1976) (holding that it was not error for the trial court to send transcripts to the jury room for a “limited purpose” not specified in the opinion); *United States v. Marin*, 513 F.2d 974, 977 (2d Cir. 1975) (finding nothing objectionable when jury took transcripts to jury room).

new car he just purchased, and describes where he went on a particular evening—all facts which investigators have independently corroborated. All of this convincingly establishes that *X* was in fact the speaker.¹⁸⁰ Next, the prosecutor plays the recording of another phone conversation, the translation of which is as follows:

Defendant *Y*: Hello.

Defendant *X*: Hello. Do you know who this is?

Defendant *Y*: Yes. Is everything set?

Defendant *X*: Almost. I still have to talk to the guy. Meet me when and where we said.¹⁸¹

Although the call was made from a phone that investigators cannot connect to defendant *X* and neither participant used *X*'s name, the government identifies *X* as the caller based on an agent's testimony that he has listened to the two recordings, has compared the voices, and is convinced that *X*, the recipient of the first call, is the person who made the second call.¹⁸² If *X* denies he participated in the second call, it may be worthwhile to play both conversations to the jury, even though they don't speak the language, so jurors can assess whether the voice attributed to *X* in the second call sounds like *X*'s voice in the first call.

Second, where the adverse party challenges the recording's audibility (capability of being heard) or intelligibility (capability of being understood), the offering party might reasonably offer to play a portion of the tape to prove its audibility and intelligibility. Likewise, the adverse party may offer to do so to prove the opposite. If the adverse party emphasizes the poor quality of the original recording, the offering party might offer to play a portion of an electronically enhanced recording that was used in preparing the transcript and translation.

Third, inflection and emphasis are guideposts to meaning. We all know that the printed word, stripped of spoken inflection, can be very misleading. Consider how, depending on tone of voice, the reply, "Yeah, right," can indicate substantial agreement—or its opposite. An attorney

180. See FED. R. EVID. 901(b)(6) (providing that the requirement of voice identification is satisfied "by evidence that a call was made to the number assigned at the time by the telephone company to a particular person [if] circumstances, including self-identification, show the person answering to be the one called").

181. I made this conversation up for purposes of illustration, but anyone who has participated in a wiretap to investigate experienced criminals has heard this sort of conversation quite frequently. (Indeed, this conversation is far more straightforward than many I encountered as a prosecutor.)

182. See FED. R. EVID. 901(b)(5), providing that it suffices to identify a voice, "whether heard firsthand or through mechanical or electronic transmission or recording, by opinion based upon hearing the voice at any time under circumstances connecting it with the alleged speaker."

who claims that the lack of inflection and tone of the words on the page misconstrue her client's meaning should do more than merely seek permission to play the conversation to the jury. Through an expert witness fluent in that language, the attorney should pinpoint the particular passage or passages in question and elicit testimony why, based on how the words were said, they should not be taken literally.¹⁸³

Fourth, challenges to transcription accuracy arguably could be resolved by playing the recording of the foreign language conversation. If the adverse party's expert asserts that a particular word or passage of a conversation was transcribed incorrectly (and therefore is mistranslated), the trial judge might consider playing that portion of the conversation for the jury as each witness testifies about it, so the jury can hear it for themselves. But this presupposes that a juror who does not speak a language will nevertheless be able to discern which transcription correctly captured the "sound" of what was said, which is a doubtful proposition at best.

2. *The Alternatives*

In lieu of playing the recording to the jury, some courts have opted to have the transcript read aloud to the jury.¹⁸⁴ But at least one court, reasoning that even a neutral reader may interject emphasis or distortion into the process, concluded that the better way is simply to distribute the translations to the jurors, watch as they read the transcripts to themselves, and then collect the transcripts again.¹⁸⁵ The latter approach

183. The position I advocate here is not inconsistent with my earlier argument in this section that jurors who do not speak the foreign language could not *on their own* correctly interpret inflections and tone. See *supra* notes 176–177 and accompanying text. An expert witness, by contrast, could demonstrate, by illustrating different inflections and tones of voice, how the same words in that language could have several different meanings—just as the words “yeah, right” do in English.

184. See *United States v. Bahadar*, 954 F.2d 821, 829–31 (2d Cir. 1992) (approving the district court's decision not to play tapes containing conversations conducted mostly in Punjab and Urdu, but rather to have a participant in the conversation read the portions the transcript attributed to him; the parts of the translation attributed to the defendant were read aloud, first by the prosecutor and, after the defense attorney objected to the prosecutor's tone of voice and overall presentation, by defense counsel); *United States v. Rengifo*, 789 F.2d 975, 977, 983 (1st Cir. 1986) (approving the prosecution's decision to have two individuals, each taking the role of a conversant, read the transcript to the jury); *United States v. Vazquez*, 605 F.2d 1269, 1272 n.4 (2d Cir. 1979) (observing that instead of playing Spanish language tapes, the prosecution distributed an English translation to the jury; a government agent read the translation aloud, identifying the speakers as the jury took notes); *Pena v. State*, 432 So. 2d 715, 717 (Fla. Dist. Ct. App. 1983) (noting that the state “read” the transcript to the jury).

185. *United States v. Franco*, 136 F.3d 622, 628–29 (9th Cir. 1998).

might be preferable—so long as the judge is confident that each of the jurors is sufficiently literate in English to read and understand the translation.

3. *Jury Access to Translations During Deliberations*

It is not unusual for a jury to seek to examine, during its deliberations, evidence that has been admitted at trial. A number of courts have held that a trial judge has discretion to permit jurors to have a translation of a foreign language conversation in the jury room during deliberations.¹⁸⁶ But some courts have expressed concern generally as to whether allowing a tape recording to go to the jury room emphasizes that evidence unduly,¹⁸⁷ and such concerns are equally applicable to the translation of a foreign language conversation.

4. *Court Reporter Act; Jones Act*

Two federal statutes are occasionally cited in court opinions relating to transcripts and translations of recorded conversations. The Court Reporter Act¹⁸⁸ requires that “all proceedings in criminal cases [held] in open court . . . shall be recorded verbatim.”¹⁸⁹ This provision does not, however, require a court stenographer to transcribe the contents of recordings that are played as evidence at a trial.¹⁹⁰ The Jones Act¹⁹¹

186. *Id.* at 628 (stating that “we find no abuse of discretion in sending the [translated] transcripts to the jury room when there is no cognizable dispute concerning the accuracy of the translation”); *United States v. Ademaj*, 170 F.3d 58, 65 (1st Cir. 1999) (observing that because the defendant failed to offer a “sufficient objection” to the government’s translation of conversations in Greek and also failed to offer an alternative translation, it was no abuse of discretion for the trial judge to authorize use of the government’s “duly authenticated” translation at trial and during jury deliberations “subject to an appropriate cautionary instruction”).

187. *See, e.g.*, *State v. Bales*, 994 P.2d 17, 21–22 (Mont. 1999) (holding that it was error to permit the jury to have an English language recording in the jury room without a prior assessment of the risk of undue emphasis, albeit harmless under the circumstances).

188. 28 U.S.C. § 753(b) (1996).

189. *Id.*

190. *United States v. Morales-Madera*, 352 F.3d 1, 6–7 (1st Cir. 2003) (rejecting statements to the contrary made in *United States v. Andiarana*, 823 F.2d 673, 676 (1st Cir. 1987)); *United States v. Craig*, 573 F.2d 455, 480 (7th Cir. 1977) (concluding that there was “no merit” to the claim that the Court Reporter Act was violated because the reporter did not transcribe a recorded conversation). *But see United States v. McCusker*, 936 F.2d 781, 785 (5th Cir. 1991) (suggesting that although the court reporter is obliged to transcribe a recorded conversation, where the recording of the conversation is available on appellate review, the error is harmless). No court—not even the Fifth Circuit—has ever cited *McCusker* approvingly for this proposition, and it has been criticized or differentiated by at least two courts. *See Morales-Madera*, 352 F.3d at 6–7; *see also Emmel v.*

provides that “[a]ll pleadings and proceedings in the United States District Court for the District of Puerto Rico shall be conducted in the English language.”¹⁹² The First Circuit has held that “[p]roviding an English-language transcript of [a recorded conversation conducted in Spanish] is more than merely useful when the recorded language is not English; for Jones Act purposes, it is necessary.”¹⁹³ Thus, it violates the Jones Act for Spanish-speaking jurors to “cast aside” the English translation and use Spanish transcripts instead.¹⁹⁴

G. Jury Instructions

A translation plays a very different role than does the transcript of a conversation conducted in English. It makes no sense for the judge to instruct jurors, as many courts insist with regard to transcripts of English language tapes,¹⁹⁵ that the translation is merely an “assistance to understanding” the recording, or that they should disregard the translation if what they hear conflicts with what they read.¹⁹⁶ Rather, the judge must instruct the jury to regard the transcript as evidence – and how to evaluate it.¹⁹⁷

Coca-Cola Bottling Co. of Chicago, 904 F. Supp. 723, 752 (N.D. Ill. 1995). Moreover *McCusker* held that if such an obligation existed, where the recording of the conversation is available on appellate review, the error is harmless. See *McCusker*, 936 F.2d at 785.

191. 48 U.S.C. § 864 (2000).

192. *Id.*

193. *Morales-Madera*, 352 F.3d at 6.

194. *United States v. Rivera-Rosario*, 300 F.3d 1, 5 (1st Cir. 2003).

195. See *supra* notes 45–47 and accompanying text.

196. *United States v. Gutierrez*, 367 F.3d 733, 736 (8th Cir. 2004) (finding no prejudice, however, because “[defendant] failed to allege that the transcripts were inaccurate”); *United States v. Gonzalez*, 365 F.3d 656, 661 (8th Cir. 2004), *vacated on other grounds*, 125 S. Ct. 1114 (2005) (finding only harmless error, however, because defendant repeatedly raised discrepancies in the government’s translation throughout the trial); *United States v. Rrapi*, 175 F.3d 742, 746 (9th Cir. 1999).

197. The Seventh Circuit instruction is as follows:

Among the exhibits admitted during the trial were recordings that contained conversations in the _____ language. You were also provided with English transcripts of those conversations. The transcripts were provided to you [by the government] so that you could consider the content of the conversations on the recordings.

Whether a transcript is an accurate translation, in whole or in part, is for you to decide. In considering whether a transcript accurately describes the meaning of a conversation, you should consider the testimony presented to you regarding how, and by whom, the transcript was made. You may consider the knowledge, training, and experience of the translator, as well as the nature of the conversation and the reasonableness of the translation in light of all the evidence in the case. You should not rely in any way on any knowledge you may have of the

CONCLUSION

Recorded conversations, and transcripts of those conversations, play a vital role in civil—and even more so in criminal—trials, often providing the evidence needed to establish a defendant’s guilt and, occasionally, his or her innocence. Rather than treating a transcript as a non-evidentiary “aid to understanding” the recording, therefore, a transcript of a recording should be recognized for what it is, i.e., opinion evidence as to the contents of the recording, and its admissibility should be governed by the same rules and procedures that apply to opinion evidence generally.

More frequently today than ever before, prosecutors, and occasionally defendants or civil litigants, seek to use, as evidence, recordings of conversations conducted in a language other than English. However, such recordings are meaningless to the typical juror unless a translation is provided. A translation of a foreign language conversation constitutes expert opinion evidence, which should be subject to the same principles and procedures as those governing expert opinion generally.

Application of the appropriate standards and procedures to recordings, transcripts, and translations will assure that the party offering the evidence will have a fair opportunity to establish the accuracy of its evidence to the judge and jury; that the adverse party will be able to challenge that evidence; and that the jury will have an adequate basis on which to evaluate it.

language spoken on the recording; your consideration of the transcripts should be based on the evidence introduced in the trial.

COMM. ON FED. JURY INSTRUCTIONS OF THE SEVENTH CIRCUIT, FEDERAL CRIMINAL JURY INSTRUCTIONS OF THE SEVENTH CIRCUIT 46 (West Group 1999). *See United States v. Jordan*, 223 F.3d 676, 689 n.10 (7th Cir. 2000). The Eighth Circuit has endorsed this instruction and urged its district courts to use it. *See Gutierrez*, 367 F.3d at 736.

