

# **EVIDENCE UPDATE**

## **CREATIVE USES OF THE FEDERAL RULES OF EVIDENCE**

**National Seminar for Federal Defenders**

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## INTRODUCTION<sup>1</sup>

These materials include a smattering of evidentiary problems that may arise in criminal trials and that one ought to think about before trial. These materials are not meant to be inclusive; they are meant to be interesting and thought-provoking. We hope they provide some answers and new ideas and inspire you to be creative.

### 1. IMPEACH ANYONE WHO DOES NOT SHOW UP, ESPECIALLY CO-CONSPIRATORS.<sup>2</sup>

How do you attack a prosecution witness who does not testify at trial but whose hearsay statements are admitted into evidence? You use Fed. R. Evid. 806 and impeach the hearsay declarant with any evidence that would have been admissible if the declarant had taken the stand. Rule 806 provides:

When a hearsay statement, or a statement defined in Rule 801(d)(2) (C), (D), or (E), has been admitted in evidence, the credibility of the declarant may be attacked, and if attacked may be supported, by any evidence which would be admissible for those purposes if the declarant had testified as a witness. Evidence of a statement or conduct by the declarant at any time, inconsistent with the declarant's hearsay statement, is not subject to any requirement that the declarant may have been afforded an opportunity to deny or explain. If the party against whom a hearsay statement has been admitted calls the declarant as a witness, the party is entitled to examine the declarant on the statement as if under cross-examination.

Rule 806 is a powerful weapon. You can use it to discredit declarants whose statements come in for the truth<sup>3</sup> through other witnesses and to rehabilitate the credibility of declarants, including your client.<sup>4</sup>

This rule provides for attacking the credibility of the hearsay declarant, not the witness who recounts the declarant's out-of-court statements.<sup>5</sup> The Advisory Committee's Notes in the

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<sup>2</sup> This discussion assumes that there are no Confrontation Clause problems with the introduction of the out-of-court statement by an unavailable declarant. See *Crawford v. Washington*, 541 U.S. 36 (2004).

<sup>3</sup> Some courts avoid the application of Rule 806 by finding that the out-of-court statements are not coming in for the truth but merely to show the context in which other statements were made. See, e.g., *U.S. v. McClain*, 934 F.2d 822, 832-33 (7<sup>th</sup> Cir. 1991) (Rule 806 did not apply because co-conspirator's statements admitted only to put defendant's statements in context.).

<sup>4</sup> See generally Margaret Meriwether Cordray, *Evidence Rule 806 and the Problem of Impeaching the Nontestifying Declarant*, 56 Ohio St. L.J. 495 (1995).

Comments to the Federal Rules of Evidence explain it like this: “The declarant of a hearsay statement which is admitted in evidence is in effect a witness. His credibility should in fairness be subject to impeachment and support as though he had in fact testified.” Fed. R. Evid. 806 Advisory Committee’s Note. Rule 806 offers two tremendous advantages: (1) impeachment evidence may be drawn from “any prior *or* subsequent inconsistent statements,” *U.S. v. Hale*, 422 U.S. 171, 176 (1975) (emphasis added); and (2) as the declarant is, by definition of Rule 806, not in court, the declarant generally never gets the opportunity to explain any inconsistencies.

## A. Examples of Using Rule 806

### 1. Prior Convictions

Using Rule 806, you can introduce any prior convictions of a declarant that would be admissible to impeach under Fed. R. Evid. 609.<sup>6</sup> For example, in *U.S. v. Burton*, 937 F.2d 324

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<sup>5</sup> The availability of this rule may also raise other issues. For example, under *Brady v. Maryland*, 373 U.S. 83 (1963) and *Giglio v. U.S.*, 405 U.S. 150, 154-55 (1972), the government has an obligation to disclose material impeachment evidence. See, e.g., *U.S. v. Jackson*, 345 F.3d 59, 70 (2d Cir. 2003) (“The fact that Redman did not testify at the defendants’ trial presents no obstacle to application of *Brady* and its progeny. Although we have never expressly stated that the government must disclose exculpatory and impeachment materials pertaining to nontestifying witnesses, that conclusion flows ineluctably from our prior cases.”). See also *U.S. v. Morrow*, 2005 WL 3163806, \*9, No. Crim.A.04-355CKK (D.D.C. April 13, 2005) (unpublished opinion) (holding that “to the extent that Defendant Perkins’ motion seeks disclosure of exculpatory and/or impeachment materials from a hearsay declarant falling under Federal Rule of Evidence 801(d)(2)(e) under *Brady*, his motion is GRANTED”); *U.S. v. Washington*, 263 F. Supp. 2d 413 (D. Conn. 2003), *adhered to on reconsideration*, 294 F. Supp. 2d 246 (D. Conn. 2003) (ordering a new trial because the prosecution failed to disclose in a timely matter impeachment material relating to a critical out-of-court now-deceased declarant whose 911 call was admitted at trial); *Caruso v. U.S.*, 1999 WL 1256254 (S.D.N.Y. Dec. 27 1999) (unpublished opinion and order) (applying *Brady* analysis to evidence that might have been used to impeach the credibility of a co-conspirator whose statements were admitted against the defendant). See generally *U.S. v. Orena*, 145 F.3d 551 (2d Cir. 1998) (defendants moved for a new trial on the ground that the government violated *Brady* by failing to disclose information that defendants could have used to impeach the credibility of out-of-court statements made by a co-conspirator that were admitted at trial; court analyzed the motion under the *Brady* standard but found that the withheld information was not material).

In addition, the admissibility of impeachment evidence under Rule 806 may result in situations at a joint trial where impeachment evidence that one co-defendant wishes to offer would not be admissible against the other. In those situations, defense counsel may be able to obtain a severance. See, e.g., *U.S. v. Perez*, 299 F. Supp. 2d 38 (D. Conn. 2004) (granting severance motion because of problems created by application of Rule 806).

<sup>6</sup> Fed. R. Evid. 609 now states:

#### Impeachment by Evidence of Conviction of Crime

(a) General rule.--For the purpose of attacking the character for truthfulness of a witness,

(1) evidence that a witness other than an accused has been convicted of a crime shall be admitted, subject to Rule 403, if the crime was punishable by death or imprisonment in excess of one year under the law under which the witness was convicted, and evidence that an accused has been convicted of such a crime shall be admitted if the court determines that the probative value of

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admitting this evidence outweighs its prejudicial effect to the accused; and

(2) evidence that any witness has been convicted of a crime shall be admitted regardless of the punishment, if it readily can be determined that establishing the elements of the crime required proof or admission of an act of dishonesty or false statement by the witness.

(b) Time limit. Evidence of a conviction under this rule is not admissible if a period of more than ten years has elapsed since the date of the conviction or of the release of the witness from the confinement imposed for that conviction, whichever is the later date, unless the court determines, in the interests of justice, that the probative value of the conviction supported by specific facts and circumstances substantially outweighs its prejudicial effect. However, evidence of a conviction more than 10 years old as calculated herein, is not admissible unless the proponent gives to the adverse party sufficient advance written notice of intent to use such evidence to provide the adverse party with a fair opportunity to contest the use of such evidence.

(c) Effect of pardon, annulment, or certificate of rehabilitation.--Evidence of a conviction is not admissible under this rule if (1) the conviction has been the subject of a pardon, annulment, certificate of rehabilitation, or other equivalent procedure based on a finding of the rehabilitation of the person convicted, and that person has not been convicted of a subsequent crime that was punishable by death or imprisonment in excess of one year, or (2) the conviction has been the subject of a pardon, annulment, or other equivalent procedure based on a finding of innocence.

(d) Juvenile adjudications. Evidence of juvenile adjudications is generally not admissible under this rule. The court may, however, in a criminal case allow evidence of a juvenile adjudication of a witness other than the accused if conviction of the offense would be admissible to attack the credibility of an adult and the court is satisfied that admission in evidence is necessary for a fair determination of the issue of guilt or innocence.

(e) Pendency of appeal. The pendency of an appeal therefrom does not render evidence of a conviction inadmissible. Evidence of the pendency of an appeal is admissible.

A trial court applies a Rule 403 balancing test when evaluating the admissibility of felony convictions when used to impeach any witness -- other than the defendant. *See, e.g., U.S. v. Tse*, 375 F.3d 148, 162 (1st Cir. 2004) (“although the proponent of the admission of the evidence of a prior conviction is the accused who seeks to impeach the government witness, the government bears the burden of protecting its witnesses from such impeachment by demonstrating to the court, pursuant to Rule 403’s exclusionary rule, that the probative value of the conviction at issue is substantially outweighed by the danger of unfair prejudice, or the other grounds for exclusion noted in Rule 403”). Rule 609 provides even more protection for the defendant. Before the government can cross-examine the defendant about a prior felony conviction, the court should determine whether the probative value of the conviction will outweigh any prejudicial effect to the defendant. It is important to note that the balancing for the defendant is different than it is for other witnesses. Rule 403 balancing presumes that the evidence is admissible unless its probative value is substantially outweighed by the danger of unfair prejudice. When the witness is the defendant, however, the presumption is that the evidence of the prior conviction is not admissible unless the court finds that its probative value outweighs its prejudicial effect. *See, e.g., U.S. v. Sanders*, 964 F.2d 295, 298 (4th Cir. 1992) (“district court failed to determine as a prerequisite to use of the evidence that the probative value of the conviction for impeachment purposes outweighed its prejudicial effect to the defendant as required by Rule 609(a)”).

In determining whether a prior conviction is admissible under Rule 609(a)(1), the courts generally consider at least the following factors: “(1) the kind of crime involved; (2) when the conviction occurred; (3) the importance of the witness’s testimony to the case; (4) the importance of the credibility of the defendant.” *Government of Virgin Islands v. Bedford*, 671 F.2d 758, 761 (3d Cir. 1982). The Seventh Circuit in *U.S. v. Gant*, 396 F.3d 906, 909 (7th Cir. 2005), supplied a similar list of relevant factors when determining whether the probative value of

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admitting a defendant's prior conviction outweighs its prejudicial effect. It suggests that the court should consider: "(1) the impeachment value of the prior crime; (2) the point in time of the conviction and the defendant's subsequent history; (3) the similarity between the past crime and the charged crime; (4) the importance of the defendant's testimony; and (5) the centrality of the credibility issue." (quoting *Rodriguez v. U.S.*, 286 F.3d 972, 983 (7th Cir. 2002), as amended on denial of reh'g and reh'g en banc, (May 21, 2002)).

Effective December 1, 2006, Rule 609(a)(2) was amended to make clear that only convictions which required, as an element of the offense, evidence that the witness engaged in an act of dishonesty or false statement fall within this provision. The Advisory Committee Notes to the 2006 amendment explains its purpose as follows:

The amendment provides that Rule 609(a)(2) mandates the admission of evidence of a conviction only when the conviction required the proof of (or in the case of a guilty plea, the admission of) an act of dishonesty or false statement. Evidence of all other convictions is inadmissible under this subsection, irrespective of whether the witness exhibited dishonesty or made a false statement in the process of the commission of the crime of conviction. Thus, evidence that a witness was convicted for a crime of violence, such as murder, is not admissible under Rule 609(a)(2), even if the witness acted deceitfully in the course of committing the crime.

To comply with this requirement, the party seeking to impeach with the prior conviction must:

have ready proof that the conviction required the factfinder to find, or the defendant to admit, an act of dishonesty or false statement. Ordinarily, the statutory elements of the crime will indicate whether it is one of dishonesty or false statement. Where the deceitful nature of the crime is not apparent from the statute and the face of the judgment -- as, for example, where the conviction simply records a finding of guilt for a statutory offense that does not reference deceit expressly -- a proponent may offer information such as an indictment, a statement of admitted facts, or jury instructions to show that the factfinder had to find, or the defendant had to admit, an act of dishonesty or false statement in order for the witness to have been convicted. Cf. *Taylor v. U.S.*, 495 U.S. 575, 602 (1990) (providing that a trial court may look to a charging instrument or jury instructions to ascertain the nature of a prior offense where the statute is insufficiently clear on its face); *Shepard v. U.S.*, 544 U.S. 13 (2005) (the inquiry to determine whether a guilty plea to a crime defined by a non-generic statute necessarily admitted elements of the generic offense was limited to the charging document's terms, the terms of a plea agreement or transcript of colloquy between judge and defendant in which the factual basis for the plea was confirmed by the defendant, or a comparable judicial record). But the amendment does not contemplate a "mini-trial" in which the court plumbs the record of the previous proceeding to determine whether the crime was in the nature of *crimen falsi*.

Advisory Committee Notes to the 2006 amendment. See generally *U.S. v. Harper*, 514 F.3d 456, 464 (5th Cir. 2008) ("The two theft-by-check convictions fall under Rule 609(a)(2) because they have as an element 'an act of dishonesty or false statement by the witness.'").

Remember that a trial court must admit evidence falling within Rule 609(a)(2). In federal court, neither the balancing test of Rule 403 nor any other balancing test applies to prior convictions admissible under Rule 609(a)(2). See *U.S. v. Guardia*, 135 F.3d 1326, 1330 (10th Cir. 1998) (noting that Rule 609(a)(2) is a "rare" instance where Rule 403 does not apply); *U.S. v. Estrada*, 430 F.3d 606, 615-16 (2d Cir. 2005), cert. denied, 547 U.S. 1048 (2006) ("The only difference between [Rule 609(a)(1) and 609(a)(2)] is that evidence of convictions for crimes involving dishonesty or false statement, whether felonies or misdemeanors, must be admitted under Rule 609(a)(2) as being per se probative of credibility, while district courts, under Rule 609(a)(1), may admit evidence of a witness's felony convictions that do not constitute *crimen falsi*, subject to balancing pursuant to Rule 403.") (citation omitted).

Although there is presumptively a 10-year time limit on the use of the prior convictions, Rule 609 provides a mechanism for using older convictions. Also, other approaches will get older convictions before the jury. For

(7<sup>th</sup> Cir. 1991), a case involving a theft ring, the prosecution introduced various audio tapes containing statements of a co-conspirator who did not testify at trial and which incriminated the defendants. The appellate court held that defense counsel was correct when he attempted to impeach the declarant's credibility by asking the FBI agent about the co-conspirator's criminal background, citing Rule 806. *Id.* at 328.<sup>7</sup>

In *U.S. v. Scott*, 48 F.3d 1389 (5<sup>th</sup> Cir. 1995), defense counsel asked a government agent about the criminal record of an informant whose audio taped conversations with the defendant had been introduced at trial. The prosecutor objected saying: "Your Honor, I have an objection. She's asking this witness to testify about the criminal record of another individual who is not a witness at this trial. I think that's improper." *Id.* at 1397. The trial court agreed with the prosecutor even though defense counsel correctly stated that she was attempting to impeach the informant. The appellate court, however, agreed with defense counsel that hearsay declarants can be impeached even if they do not testify at the trial. Unfortunately, that court found the defendant had not preserved the error under Rule 806 because counsel's response had not been sufficiently specific. Although counsel asked to make an offer of proof, that offer was of the informant's criminal record in its entirety. The record included convictions over ten years old that would not have been admissible under Rule 609(b) for impeachment purposes. Try to avoid outcomes like this one by making a specific, detailed offer of proof, stating the rule and why each item you want admitted is admissible.

## 2. Inconsistent Statements

*U.S. v. Bernal*, 719 F.2d 1475 (9<sup>th</sup> Cir. 1983), provides a good example of using Rule 806 to impeach through the introduction of an inconsistent statement. In that case, an agent testified to the statements of a co-conspirator incriminating the defendant. Those statements were admissible under the co-conspirator exception, Rule 801(d)(2)(E). On cross-examination of a different agent, the defense counsel elicited testimony about another, contradictory statement from the co-conspirator. That statement was admitted pursuant to Rule 806. *See also U.S. v. Grant*, 256 F.3d 1146, 1152-56 (11<sup>th</sup> Cir. 2001) (conviction reversed because trial court improperly excluded inconsistent statements offered by defense to impeach co-conspirator whose out-of-court statements were introduced by the prosecution).

Failure to make a proper record led the appellate court to rule against the defendant in *U.S. v. King*, 73 F.3d 1564 (11<sup>th</sup> Cir. 1996). In that case, the defendant wanted to introduce

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example, you may be able to argue that an older conviction gives the witness motive to slant his testimony because he might otherwise be subjected to a habitual offender proceeding, an enhanced sentence or other adverse consequences. Similarly, despite the fact that Rule 609 presumptively disallows juvenile adjudications if offered under that rule, they are admissible when used to show motive or bias. *See Davis v. Alaska*, 415 U.S. 308 (1974) (refusal to allow defendant to cross-examine key prosecution witness to show his probation status following an adjudication of juvenile delinquency denied defendant his constitutional right to confront witnesses, notwithstanding state policy protecting anonymity of juvenile offenders).

<sup>7</sup> Despite this error, the court in *Burton* affirmed based on the overwhelming facts supporting the defendants' convictions.

exculpatory post-arrest statements of a non-testifying co-conspirator to impeach the incriminating pre-arrest statements the prosecutor had introduced under the co-conspirator exception to hearsay, Rule 801(d)(2)(E). At trial defense counsel sought to have the statements admitted as exceptions to hearsay either as present sense impressions, excited utterances, under the former catchall exception of Rule 803, or even as a statement against interest under Rule 804. On appeal, however, the defendant argued that the post-arrest statements would have been admissible as prior inconsistent statements had the co-conspirator testified at trial and, therefore, should have been admitted under Rule 806. The court's response was that the "argument appears to have merit, but it comes too late." *Id.* at 1571. The court reviewed the issues under a plain error analysis and, not surprisingly, affirmed the conviction.

Rule 806 expressly permits counsel to impeach a hearsay declarant with inconsistent statements even though the declarant has not been afforded an opportunity to deny or explain these statements. Indeed, that is one of its benefits. The government's argument that the defendant had passed up an opportunity to take the deposition of the co-conspirator (when the co-conspirator could have denied or explained the inconsistency) fell on deaf ears in *U.S. v. Wali*, 860 F.2d 588 (3d Cir. 1988). The Third Circuit reversed the defendant's conviction because the trial court refused to permit defense counsel, who had the foresight to skip the opportunity for a deposition in Europe, to cross-examine the government agent regarding the co-conspirator's inconsistent statements exculpating the defendant.

### 3. Bias and Motive

In *U.S. v. Check*, 582 F.2d 668 (2d Cir. 1978), the defense properly used Rule 806 to show bias and a motive to testify falsely by asking if the witness knew that the informant "was facing a serious criminal charge in the state court in about that time." *Id.* at 684 n.44. Ironically, the prosecutor complained to the judge that counsel was trying "to discredit the informant through this witness." *Id.* Indeed he was, and rightly so. See generally *U.S. v. Abel*, 469 U.S. 45 (1984) (can always prove bias extrinsically).

### 4. Opinion and Reputation

Just as one may impeach a witness through opinion or reputation evidence of his dishonesty, you can present opinion or the reputation evidence of the declarant's character for dishonesty. See Fed. R. Evid. 608(a).<sup>8</sup> For example, the defendant in *U.S. v. Moody*, 903 F.2d 321 (5<sup>th</sup> Cir. 1990), won a reversal because the trial court refused to allow his counsel to

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<sup>8</sup> Fed. R. Evid. 608(a) states:

#### Evidence of Character and Conduct of Witness

(a) Opinion and reputation evidence of character. The credibility of a witness may be attacked or supported by evidence in the form of opinion or reputation, but subject to these limitations: (1) the evidence may refer only to character for truthfulness or untruthfulness, and (2) evidence of truthful character is admissible only after the character of the witness for truthfulness has been attacked by opinion or reputation evidence or otherwise.

cross-examine the testifying witness about the co-conspirators' reputations for dishonesty. Similarly, although the court affirmed the convictions in *U.S. v. Katsougrakis*, 715 F.2d 769 (2d Cir. 1983), because it found the error harmless, the court did find that the defense should have been permitted to question a prosecution witness about the reputation of the hearsay declarant whose statements he was repeating.

## 5. Bolstering a Witness

You can also use Rule 806 to rehabilitate a declarant. In *U.S. v. Lechoco*, 542 F.2d 84 (D.C. Cir. 1976), counsel called three psychiatrists in support of the theory that the defendant was legally insane at the time he committed the crime. The government called into question the reliability of the information underlying each doctor's opinion, specifically, the information they each had received from the defendant. Thus, the prosecutor too (perhaps unknowingly) relied on Rule 806 to attack a declarant, in this case the defendant. The appellate court ruled that the trial court's refusal to allow the defense "to elicit testimony relating to the defendant's reputation for truthfulness and honesty" in response to the prosecution's cross-examination of the defense experts was error. *Id.* at 87.

### B. Extrinsic Evidence May Be Admissible Under Fed. R. Evid. 608(b)

Fed. R. Evid. 608(b) gives the trial court discretion to permit counsel to cross-examine a witness concerning specific instances when that witness has lied. However, counsel is not permitted to introduce extrinsic evidence if the witness denies that she lied.<sup>9</sup> That limitation creates problems when you are using Rule 806 to impeach a declarant who is not in court.

One court has suggested, in dicta, that Fed. R. Evid. 608(b)'s provision prohibiting the use of extrinsic evidence to prove specific instances of conduct in cross-examination for the purpose of attacking or supporting a witness's credibility should be relaxed where the declarant has not testified. In *U.S. v. Friedman*, 854 F.2d 535 (2d Cir. 1988), the court ruled that the attempted impeachment of the credibility of a deceased witness through the introduction of evidence that he had lied to a policeman about a suicide attempt had no probative value and might confuse the jury. The court did note, however, that "Rule 806 applies, of course, when the declarant has not testified and there has by definition been no cross-examination, and resort to extrinsic evidence may be the only means of presenting such evidence to the jury." *Id.* at 570 n.8.

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<sup>9</sup> Fed. R. Evid. 608(b) provides:

(b) Specific instances of conduct. Specific instances of the conduct of a witness, for the purpose of attacking or supporting the witness' character for truthfulness, other than conviction of crime as provided in rule 609, may not be proved by extrinsic evidence. They may, however, in the discretion of the court, if probative of truthfulness or untruthfulness, be inquired into on cross-examination of the witness (1) concerning the witness' character for truthfulness or untruthfulness, or (2) concerning the character for truthfulness or untruthfulness of another witness as to which character the witness being cross-examined has testified.

At least two circuits, however, take a somewhat different approach. In *U.S. v. White*, 116 F.3d 903, 920 (D.C. Cir. 1997), the district court had allowed defense counsel to cross-examine a police officer about a hearsay declarant's drug use, drug dealing, and prior convictions, but had not allowed defense counsel to impeach the declarant's credibility by asking the officer whether the declarant had ever made false statements on an employment form or disobeyed a court order. The declarant was unavailable because he had been murdered. The D.C. Circuit Court of Appeals concluded that defense counsel should have been allowed to cross-examine the officer about the declarant's making false statements and disobeying a court order. In doing so, the court observed that defense counsel "could not have made reference to any extrinsic proof of those acts" during cross-examination. *Id.* at 921–22. Similarly, in *U.S. v. Saada*, 212 F.3d 210 (3d Cir. 2000), the Third Circuit held that the trial court erred in taking judicial notice of and permitting the government to introduce extrinsic evidence of a hearsay declarant's dishonest behavior. Instead, the court concluded that the government could have cross-examined the witness -- through whom the hearsay statement was admitted -- concerning specific instances of the declarant's dishonesty in the hope that the witness was aware of them. If the witness was not aware of those acts, then the government would have been limited to the witness's answers.

### **C. The Defense Can Attack the Reliability of the Defendant's Out-Of-Court Statements**

Although Rule 806 does not expressly include attempts to attack a party's out-of-court statements, courts have held that it does include admissions of a party opponent. As the court in *U.S. v. Shay*, 57 F.3d 126 (1<sup>st</sup> Cir. 1995), noted, the Senate Judiciary Committee's report states:

The committee considered it unnecessary to include statements contained in rule 801(d)(2)(A) and (B) -- the statement by the party-opponent himself or the statement of which he has manifested his adoption -- because the credibility of the party-opponent is always subject to an attack on his credibility.

*Id.* at 131, quoting from S. Rep. No. 1277, 93d Cong. 2d Sess. (1974), 1974 U.S.C.C.A.N. 7051, 7069. *Shay* is an unusual case because the defense wanted to introduce expert testimony to show the defendant suffered from a mental disease that caused him to fabricate the confession he told the police. In effect, the defense was offering evidence that the defendant was not a truthful person. See also *U.S. v. Dent*, 984 F.2d 1453, 1460 (7<sup>th</sup> Cir. 1993) (Rule 806 applies to a party's own statement as defined in Rule 801(d)(2)(A) or (B)).

### **D. An Advanced Course In 806: Creative Uses**

You may use Rule 806 in other creative ways. In *People v. Rosoto*, 373 P.2d 867, 885 (Cal. 1962), *modified on other grounds*, 401 P.2d 220 (Cal. 1965), a criminal defense lawyer demonstrated an inspired approach to using Rule 806. The prosecutor read into evidence the testimony of a witness who had testified at a previous trial.<sup>10</sup> The defense called the court

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<sup>10</sup> The witness had died after the first trial through no fault of the defendant.

reporter from that earlier proceeding who testified that the witness “shook visibly while testifying, and told her during recess and as he was leaving the stand: ‘I had to testify that way. I was threatened. They would have shot me.’” *Id.* The court held that this “testimony . . . was properly received for the purpose of impeaching [the declarant] by proof of subsequent inconsistent statements.” *Id.*

## **2. WATCH OUT! THE PROSECUTION CAN IMPEACH YOUR CLIENT, EVEN IF YOUR CLIENT NEVER TESTIFIES.**

Be careful! You too may open the door to the issue of your client’s credibility. In *U.S. v. Montana*, 199 F.3d 947 (7th Cir. 1999), the defendant’s lawyer called a witness who he hoped would exonerate his client in a bank robbery. The witness proved uncontrollable and repeated statements the defendant had made to him. This opened the door for the government to impeach the defendant, as an out-of-court declarant with his extensive criminal record. Similarly, in *U.S. v. Lawson*, 608 F.2d 1129, 1130 (6th Cir. 1979), even though Lawson did not testify, his counsel cross-examined a Secret Service agent to establish that Lawson had consistently denied any involvement in a counterfeiting scheme, and introduced a written statement in which Lawson denied all complicity. By putting these hearsay statements before the jury, Lawson’s credibility became an issue in the case the same as if Lawson had made the statements from the witness stand. The court ruled, therefore, that Lawson’s two prior convictions were admissible, pursuant to Rule 806.

*U.S. v. Noble*, 754 F.2d 1324 (7th Cir. 1985), is also instructive. In that case, the defense counsel produced a tape recording containing a conversation between the defendant and an agent. The introduction of this conversation subjected the defendant to impeachment with his prior conviction. Trial counsel was obviously unaware of the ramifications of Rule 806. When he learned the court would permit introduction of evidence regarding the prior conviction he said “quite frankly, I have to admit to being caught flat-footed as to this. I cannot believe, although I haven’t [sic] heard it, that it is being done. I am totally shocked and absolutely unprepared that this would happen and that this would be admitted . . .” *Id.* at 1335 n.10. *See also* 5 Jack Weinstein & Margaret Berger, *Weinstein’s Federal Evidence* § 806.04[2][b], at 806-11 to 806-12 (Joseph McLaughlin ed., 2d ed. 1997) (“Rule 806 can set a trap for criminal defense counsel. A defendant who chooses not to testify but who succeeds in getting his or her own exculpatory statements into evidence runs the risk of having those statements impeached by felony convictions.”); *U.S. v. McClain*, 934 F.2d 822 (7th Cir. 1991) (prior recorded statements were admissible for impeachment of non-testifying defendant, after defendant opened door by introducing tapes of exculpatory statements he made, without violating either Federal Rules of Evidence or the Fifth Amendment).

### 3. GET YOUR EVIDENCE IN FRONT OF THE JURY DURING THE PROSECUTION'S DIRECT EXAMINATION.

#### A. Generally

Fed. R. Evid. 106 provides:

When a writing or recorded statement or part thereof is introduced by a party, an adverse party may require the introduction at that time of any other part or any other writing or recorded statement which ought in fairness to be considered contemporaneously with it.

This under-used and little understood rule can have significant implications in trial. Use it to put your case in front of the jury in the middle of the prosecution's case -- when the damage is being done. The key words in this rule are *at that time*. Rule 106 "protects litigants from the twin pitfalls of creative excerpting and manipulative timing." *U.S. v. Boylan*, 898 F.2d 230, 256 (1st Cir. 1990).<sup>11</sup> This means that when the prosecutor introduces a document or part of a document, or a recorded statement or a portion of a recorded statement in a way that distorts its meaning, you can insist that the remainder of that document or statement or a completely different document or statement be introduced at the same time -- during the prosecution's direct examination. Therefore, this rule affects the timing of the introduction of written or recorded evidence.

It is best to identify Rule 106 as the method of introduction and to assert the necessity of the introduction at the time of the offending questions and answers. Do not wait until cross-examination if you want to rely on Rule 106 for admission of the evidence. *See, e.g., U.S. v. Larranaga*, 787 F.2d 489 (10<sup>th</sup> Cir. 1986). In that case the appellate court found that the defendant "did not follow the procedure outlined in Rule 106 'at that time' when the questions and answers were introduced. Thus defendant's reliance on Rule 106 is misplaced." *Id.* at 500. Interrupting the prosecution's case to insert your evidence is far more persuasive than waiting until cross; so use this ability to interject your evidence into the prosecution's case to your advantage.

Should you choose to wait until your examination, however, first check the rules in your jurisdiction. Some courts have not been so stringent about requiring Rule 106 evidence to be introduced during the other side's examination. In *Phoenix Associates III v. Stone*, 60 F.3d 95 (2d Cir. 1995), the defendant introduced financial documents pursuant to Rule 106 but waited to do so until during his direct examination of a witness. Nevertheless, the court found no error. "While the wording of Rule 106 appears to require the adverse party to proffer the associated document or portion contemporaneously with the introduction of the primary document, we have

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<sup>11</sup> The purpose of the "completeness" rule codified in Rule 106 is merely to make sure that a misleading impression created by taking matters out of context is corrected on the spot, because of "the inadequacy of repair work when delayed to a point later in the trial." Notes of Advisory Comm. on Proposed Rule 106. *U.S. v. LeFevour*, 798 F.2d 977, 981 (7<sup>th</sup> Cir. 1986).

not applied this requirement rigidly.” *Id.* at 103; *see also U.S. v. Rubin*, 609 F.2d 51, 63 (2d Cir. 1979), *aff’d*, 449 U.S. 424 (1981) (upholding admission of notes under Rule 106 even though government waited until its redirect examination of witness to introduce them).

Although Rule 106 reads like the defense lawyer’s friend, the scope of the rule is narrow. The word “fairness” in the rule usually means relevant to the admitted portions or fragments of writings or recorded statements. In an oft-cited Supreme Court case, *Beech Aircraft Corp. v. Rainey*, 488 U.S. 153 (1988), the Court held that “when one party has made use of a portion of a document, such that misunderstanding or distortion can be averted only through presentation of another portion, the material required for completeness is ipso facto relevant and therefore admissible under Rules 401 and 402.” *Id.* at 172 (emphasis added).<sup>12</sup> Although *Beech Aircraft* was a civil case and skirted the Rule 106 issue,<sup>13</sup> many criminal cases that deal with Rule 106 refer to it.

## B. Oral Statements

Rule 106 generally does not apply to an oral statement unless it has been recorded. *See, e.g., U.S. v. Bigelow*, 914 F.2d 966, 972 (7<sup>th</sup> Cir. 1990) (“This rule, however, applies only to written and recorded materials.”). Later decisions from the same circuit, however, have implied that Rule 106 may apply to oral statements. Although not finding error in the trial court’s refusal to admit portions of a defendant’s post-arrest interview, after the government did admit some portions, the court in *U.S. v. Lewis*, 954 F.2d 1386 (7<sup>th</sup> Cir. 1992), applied a Rule 106 analysis. Furthermore, *U.S. v. Haddad*, 10 F.3d 1252, 1258 (7<sup>th</sup> Cir. 1993), cites to *Lewis* for the proposition that “the Seventh Circuit has applied a Rule 106 analysis with respect to oral statements and testimonial proof.”

Even if Rule 106 might not fit precisely, some federal courts have suggested that oral statements could be admitted pursuant to Fed. R. Evid. 611(a), which gives the trial court broad discretion to control the mode and order of interrogating witnesses.<sup>14</sup> In *U.S. v. Castro*, 813

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<sup>12</sup> When the defense called Rainey, the plaintiff below, as an adverse witness (he did not testify in his case in chief), the defense lawyer asked him about two specific statements from a letter he had written. On cross, the defendant successfully objected to the plaintiff asking questions that sought more detailed information about the content of the letter, arguing that the letter contained improper opinion. In reversing, the Supreme Court had “no doubt that the jury was given a distorted and prejudicial impression of Rainey’s letter.” *Id.* at 170.

<sup>13</sup> In *Beech Aircraft*, the Court noted: “While much of the controversy in this suit has centered on whether Rule 106 applies, we find it unnecessary to address that issue. Clearly the concerns underlying Rule 106 are relevant here, but, as the general rules of relevancy permit a ready resolution to this litigation, we need go no further in exploring the scope and meaning of Rule 106.” *Id.* at 172.

<sup>14</sup> Fed. R. Evid. 611 Mode and Order of Interrogation and Presentation, provides in relevant part:

- (a) Control by court. The court shall exercise reasonable control over the mode and order of interrogating witnesses and presenting evidence so as to (1) make the interrogation and presentation effective for the ascertainment of the truth, (2) avoid needless consumption of time, and (3) protect witnesses from harassment or undue embarrassment.

F.2d 571, 576 (2d Cir. 1987), the court noted that while Rule 106 does not apply to the spoken word (unless recorded), we remain guided by the overarching principle that it is the trial court's responsibility to exercise common sense and a sense of fairness to protect the rights of the parties while remaining ever mindful of the court's obligation to protect the interest of society in the 'ascertainment of the truth.'" Fed. R. Evid. 611(a). *See also U.S. v. Range*, 94 F.3d 614, 620-21 (11<sup>th</sup> Cir. 1996) ("Rule 106 provides that when a writing or recorded statement is introduced by a party, an adverse party may require the introduction . . . of any other part . . . which in fairness ought to be considered contemporaneously with it. Fed. R. Evid. 611(a) has been read to impose the same fairness standard upon conversations."); *U.S. v. Li*, 55 F.3d 325, 329 (7<sup>th</sup> Cir. 1995) ("Fed.R.Evid. 611(a) grants district courts the same authority regarding oral statements which [Rule] 106 grants regarding written and recorded statements."); *U.S. v. Mussaleen*, 35 F.3d 692, 696 (2d Cir. 1994) (Rule 611(a) mandates that "[t]he court shall exercise reasonable control over the mode and order of interrogating witnesses and presenting evidence so as to (1) make the interrogation and presentation effective for the ascertainment of the truth, (2) avoid needless consumption of time, and (3) protect witnesses from harassment or undue embarrassment."). Thus, even if a Rule 106 argument may not be fruitful when you are trying to admit an oral statement, Rule 611(a) may prove helpful.

### C. Test for Introduction of Rule 106 Evidence

Begin your argument for introduction of documents pursuant to Rule 106 by explaining the test to the judge and clarifying how your evidence fits the test. The "fairness" test has two parts:

- (1) The relevance to the issues at trial of the portions of the writing or recording you want admitted; and
- (2) The ability of specific excluded portions "to qualify, explain, or place into context the portion already introduced."

*U.S. v. Pendas-Martinez*, 845 F.2d 938, 944 (11<sup>th</sup> Cir. 1988). Therefore, to be admissible under Rule 106, the excluded portions must meet both parts (1) and (2) of the rule above. *U.S. v. Branch*, 91 F.3d 699, 728 (5<sup>th</sup> Cir. 1996); *see also U.S. v. Walker*, 652 F.2d 708 (7<sup>th</sup> Cir. 1981).<sup>15</sup> This is the general rule, although the circuits have taken somewhat different approaches. *Compare U.S. v. Glover*, 101 F.3d 1183, 1190 (7<sup>th</sup> Cir. 1996) (court is to apply a four-part test to determine whether the offered portions of the statement are necessary to: (1) explain the admitted evidence, (2) place the admitted portions in context, (3) avoid misleading the trier of fact, and (4) insure fair and impartial understanding of the evidence) (emphasis added)<sup>16</sup> with *U.S. v. Soures*, 736 F.2d 87, 91 (3d Cir. 1984) ("Under the doctrine of

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<sup>15</sup> *Walker* is one of those rare cases where the defendant used Rule 106 successfully on appeal. Defendant Walker was a fire fighter accused of extortion. His first trial ended with a hung jury. Walker did not testify at his second trial, but the prosecution introduced portions of his testimony from the first trial. The trial judge refused to admit exculpatory portions of the transcript; the Seventh Circuit held this to be reversible error under Rule 106.

<sup>16</sup> The Seventh Circuit opinions are not consistent regarding whether the test is disjunctive or conjunctive. *See, e.g., U.S. v. Sweiss*, 814 F.2d 1208, 1211-12 (7<sup>th</sup> Cir. 1987) ("Under the doctrine of completeness, another writing or tape

completeness, a second writing may be required to be read if necessary to (1) explain the admitted portion, (2) place the admitted portion in context, (3) avoid misleading the trier of fact, or (4) insure a fair and impartial understanding”) (emphasis added).

#### **D. What if Evidence Is Otherwise Inadmissible?**

This is a tricky question and the courts have not been consistent in its answer. Generally, Rule 106 is considered a rule that changes the normal order of proof rather than dealing with the substance of the evidence. Several arguments, however, favor permitting otherwise inadmissible evidence to come in under Rule 106. First, the rule contains no proviso, as is found in every major rule of exclusion in the rules, i.e., “except as otherwise provided by these rules.” Also, the only limitation on the common law doctrine of completeness was on grounds of privilege. *See generally* Wright & Graham, Federal Practice and Procedure: Evidence § 5078, at 373-74.

Rule 106 can adequately fulfill its function only by permitting the admission of some otherwise inadmissible evidence when the court finds in fairness that the proffered evidence should be considered contemporaneously. A contrary construction raises the specter of distorted and misleading trials, and creates difficulties for both litigants and the trial court.

*U.S. v. Sutton*, 801 F.2d 1346, 1367 (D.C. Cir. 1986). In *Sutton*, the appellate court held that the trial court should have admitted portions of the taped conversation although it was otherwise inadmissible, but the appellate court found that the error was harmless. The Seventh Circuit reached a similar conclusion in *U.S. v. LeFevour*, 798 F.2d 977 (7<sup>th</sup> Cir. 1986). “If otherwise inadmissible evidence is necessary to correct a misleading impression, then either it is admissible for this limited purpose . . . or, if it is inadmissible (maybe because of privilege), the misleading evidence must be excluded too.” *Id.* at 980. *See also U.S. v. Baker*, 432 F.3d 1189, 1223 (11<sup>th</sup> Cir. 2005) (“We have extended Rule 106 to oral testimony in light of Rule 611(a)’s requirement that the district court exercise ‘reasonable control’ over witness interrogation and the presentation of evidence to make them effective vehicles ‘for the ascertainment of truth.’ Thus, the exculpatory portion of a defendant’s statement should be admitted if it is relevant to an issue in the case and necessary to clarify or explain the portion received. In this case, Pless’s exculpatory statements were relevant to his involvement in acts implicating him in the Count 2 conspiracy, and were necessary to clarify those portions related by Detective Simmons. The district court therefore abused its discretion in denying Pless’s motion.”) (citations omitted); *U.S. v. Awon*, 135 F.3d 96, 101 (1<sup>st</sup> Cir. 1998), *abrogated on other grounds by U.S. v. Piper*, 293 F.3d 47 (1<sup>st</sup> Cir. 2002) (“This doctrine, codified in Fed. R. Evid. 106, holds that an otherwise inadmissible recorded statement may be introduced into evidence where one side has made a partial disclosure of the information, and full disclosure would avoid unfairness to the other party.”); *but see U.S. v. Leon-Delfis*, 203 F.3d 103 (1<sup>st</sup> Cir. 2000) (“Whether Rule 106 provides an independent ground for admitting evidence at trial is an open question in this circuit.”).

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recording is ‘required to be read if it is necessary to (1) explain the admitted portion, (2) place the admitted portion in context, (3) avoid misleading the trier of fact, or (4) insure a fair and impartial understanding.’”). To add to the confusion, the *Glover* opinion cites *Sweiss*, which applies a disjunctive test, to support applying a conjunctive test.

Other courts have held that Rule 106 “covers an order of proof problem; it is not designed to make something admissible that should be excluded.” *U.S. v. Costner*, 684 F.2d 370, 373 (6<sup>th</sup> Cir. 1982) (reversible error in admission of evidence against defendant which was inadmissible hearsay and a violation of Rule 404(a)). When the inadmissibility is grounded on Rule 403, the argument for exclusion is particularly strong. “Unlike other exclusionary rules, Rule 403 does not explicitly provide that it is subject to other evidentiary provisions. . . . Indeed, the ‘fairness’ standard prescribed by Rule 106 strongly suggests the appropriateness of the type of inquiry more specifically required by Rule 403.” *Merrick v. Mercantile-Safe Deposit & Trust Co.*, 855 F.2d 1095, 1104 (4<sup>th</sup> Cir. 1988); *see also U.S. v. Rivera*, 61 F.3d 131, 136 (2d Cir. 1995) (Rule 106 does not make otherwise inadmissible evidence admissible).

### **E. Co-defendants and *Bruton* Issues**

*Bruton v. U.S.*, 391 U.S. 123 (1968), limits the use at trial of the statements of a codefendant who does not testify. The rule is beginning to take a back seat to *Bruton* issues regarding codefendants’ confessions (rather than the obvious solution of either (1) not admitting any portion of a statement or (2) granting defendants separate trials). In cases with codefendants, courts have allowed redacted statements into evidence and seem to offer more *Bruton* protection than Rule 106 protection. For example, in *U.S. v. Smith*, 794 F.2d 1333 (8th Cir. 1986), two defendants (Smith and Sutton) were found guilty of securities violations. Sutton’s redacted post-arrest statement was admitted into evidence, over defense objections that under Rule 106 the court should have admitted the entire statement. Portions of the statement Sutton sought to admit would have inculpated Smith. In dealing with this *Bruton* problem, the court held that “the rule of completeness will be violated only when the statement in its edited form, while protecting the sixth amendment rights of the co-defendant, effectively ‘distorts the meaning of the statement or excludes information substantially exculpatory’ of the nontestifying defendant.” *Id.* at 1335 (citation omitted). In that case, the court found that the excluded portions were “neither explanatory of nor relevant to those portions of the statement introduced by the prosecution.” *Id.*

### **F. When is a Writing or Recording “Complete”?**

What constitutes “complete” can also be a difficult question. In *U.S. v. Boylan*, 898 F.2d 230 (1<sup>st</sup> Cir. 1990), the RICO defendants were ex-policemen who wanted all of their personnel files admitted, not just the portions the prosecution selected. On appeal, the court found “no valid basis for a per se rule that all documents contained in agglomerated files must be admitted into evidence merely because they happen to be physically stored in the same folder.” *Id.* at 257. The case includes a discussion of this important Rule 106 question: “if Rule 106 applies, what is it that must be complete?” *Id.* at 256. The court discusses what should be an appropriate and complete “unit of material”:

[I]n determining the admissibility of various units contained in document collections, a preliminary decision must be made as to what grouping constitutes a fair and reasonably complete unit of material. In some cases, that unit may be a single document; in others, all the documents; or in a third case, some subpart of a document or collection.

**Id.** The “unit of material,” as the court calls it, could be an important strategic consideration for defense lawyers.

Courts are not required to admit entire documents to satisfy the rule of completeness -- only those portions which meet the test described above. *See, e.g., U.S. v. Glover*, 101 F.3d 1183 (7<sup>th</sup> Cir. 1996) (no abuse of discretion in denying defendant’s request to admit nearly all of his testimony from prior trial, after admitting portions of such testimony in retrial in which defendant chose not to testify, because defendant failed to show that entire transcript was relevant); *see also U.S. v. Flentge*, 151 Fed. Appx. 490 (8<sup>th</sup> Cir. 2005) (unpublished opinion) (defense counsel failed to meet his burden under Rule 106 because he failed to identify the portions of the record which “would be relevant to the trial and how the additional excerpts would place the government’s evidence in context”). If you can make the proper showing under Rule 106, you may be able to introduce an entire file, an entire document, an entire recording -- or some smaller portion of a file or document or recording.<sup>17</sup> *U.S. v. Boylan*, 898 F.2d 230, 257 (1<sup>st</sup> Cir. 1990).

Always remember the trial judge enjoys great discretion. *U.S. v. Collicott*, 92 F.3d 973, 983 (9<sup>th</sup> Cir. 1996). Use the rule at trial but don’t expect to get anywhere with it on appeal. Only rarely will appellate courts overturn a conviction based on a Rule 106 violation. *But see U.S. v. Walker*, 652 F.2d 708, 710 (7<sup>th</sup> Cir. 1981) (conviction reversed because defense not permitted to introduce exculpatory portions of transcript after prosecution introduced inculpatory portions).

### **G. Opening the Door**

Remember, Rule 106 works both ways; the prosecution can introduce documents or portions of documents during your case as well. *See generally U.S. v. Williams*, 106 F.3d 1173 (4<sup>th</sup> Cir. 1997) (inadmissible out-of-court statement by undercover informant implicating defendant in drug distribution was admissible because defense counsel opened door by eliciting testimony that law enforcement agent had no personal knowledge of any business dealings between defendant and undercover informant thus creating potential to mislead jury). If this happens, in the appropriate circuits, argue that the document is not otherwise admissible. *See generally U.S. v. Collicott*, 92 F.3d 973, 983 (9<sup>th</sup> Cir. 1996) (conviction reversed because, after defendant introduced prior inconsistent statement of informant, trial court permitted prosecution to question agent about other inadmissible hearsay statements informant made). If possible, argue that introduction would circumvent the prohibitions contained in Rule 403 or in the Confrontation Clause. Hinge all arguments on the “fairness” words in the rule.

In addition to arguing that the evidence the prosecutor wants to admit is otherwise inadmissible or should be excluded on Rule 403 grounds, you can also try to limit the prosecution’s use of Rule 106 against the defendant by arguing that if the original document was

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<sup>17</sup> Of course, the government may also use Rule 106 to introduce even more written or recorded material after you introduce yours. Additionally, the government can use Rule 106 to introduce evidence during your case.

introduced only for impeachment, the Rule 106 evidence should also be limited to impeachment. See *U.S. v. Pierre*, 781 F.2d 329, 332 n.2 (2d Cir. 1986) (“Where the first document is introduced not as substantive evidence but only to impeach credibility, the document offered for completeness would seem to be appropriately introduced also not as substantive evidence but only to rehabilitate credibility.”).

Finally, try to limit the scope of statements that the court permits the government to introduce. For example, the court should not permit the government to introduce entire transcripts of a police officer’s testimony at the grand jury or suppression hearing or his entire police report without requiring that the government specify the portions that were relevant to the issues allegedly taken out of context on cross-examination. *U.S. v. Ramos-Caraballo*, 375 F.3d 797, 803 (8<sup>th</sup> Cir. 2004) (“The rule of completeness permits nothing more than setting the context and clarifying the answers given on cross-examination; it is not proper to admit ‘all prior consistent statements simply to bolster the credibility of a witness who has been impeached by particulars.’”); see also *U.S. v. Moussaoui*, 382 F.3d 453, 482 (4<sup>th</sup> Cir. 2004) (“In short, we wish to make clear that the rule of completeness is not to be used by the Government as a means of seeking the admission of inculpatory statements that neither explain nor clarify the statements designated by Moussaoui.”).

#### **4. MAKE THE PROSECUTION EAT ITS WORDS.**

Fed. R. Evid. 801(d)(2) provides, in relevant part, that:

[a] statement is not hearsay if . . . [t]he statement is offered against a party and is (A) the party's own statement, in either an individual or representative capacity, or (B) a statement of which the party has manifested an adoption or belief in its truth, or (C) a statement by a person authorized by the party to make a statement concerning the subject, or (D) a statement by the party’s agent or servant concerning a matter within the scope of the agency or employment, made during the existence of the relationship, or (E) a statement by a coconspirator of a party during the course and in furtherance of the conspiracy. The contents of the statement shall be considered but are not alone sufficient to establish the declarant's authority under subdivision (C), the agency or employment relationship and scope thereof under subdivision (D), or the existence of the conspiracy and the participation therein of the declarant and the party against whom the statement is offered under subdivision (E).

The typical admission that falls within the parameters of this rule is that made by an actual party or an agent. See generally *McCormick on Evidence* 447-70 (4th ed. 1992). Lawyers and agents of lawyers can make statements on behalf of their clients. Sometimes the client is the government in a civil or criminal case, and sometimes the client is the defendant in a criminal case.

Lawyers who represent the federal government or a state often forget that they represent a party to a lawsuit and that, as such, they can make admissions on behalf of that party when they argue and write briefs both during and before trial, and in wholly unrelated proceedings. “The Federal Rules clearly contemplate that the federal government is a party-opponent of the defendant in criminal cases.” *U.S. v. Morgan*, 581 F.2d 933, 937 n.10 (D.C. Cir. 1978); *see also U.S. v. Branham*, 97 F.3d 835 (6<sup>th</sup> Cir. 1996) (where government conceded that Rule 801(d)(2)(D) contemplates that the federal government is a party-opponent of the defendant in a criminal case); *U.S. v. Bakshinian*, 65 F. Supp. 2d 1104 (C.D. Cal. 1999) (statement made by government prosecutor in trial of defendant’s co-conspirator is that of party opponent).. This is powerful stuff and can lead to very interesting evidence. Here are some examples of how it comes up and how you can use it to benefit your client.

#### A. Admissions from Other Cases

Lawyers in the Justice Department wrote a brief in a civil case that contradicted the testimony of a government witness during a criminal trial in *U.S. v. Kattar*, 840 F.2d 118 (1<sup>st</sup> Cir. 1988). Therefore, the defendant argued that the jury should have the benefit of the brief and moved, unsuccessfully, to admit it. The appellate court held that the Justice Department was a party-opponent within the meaning of Rule 801(d)(2) and that the statements in the brief in the civil case were admissible as statements to which the party-opponent has manifested an adoption or belief in its truth.

The Justice Department here has, as clearly as possible, manifested its belief in the substance of the contested documents; it has submitted them to other federal courts to show the truth of the matter contained therein. We agree with Justice (then Judge) Stevens that the assertions made by the government in a formal prosecution (and, by analogy, a formal civil defense) “establish the position of the United States and not merely the views of its agents who participate therein.”

*Id.* at 131.

Although the *Kattar* court found the error to be harmless in light of other evidence against the defendant, its holding was clear. “The inconsistency of the government’s positions about the Church should have been made known to the jury. The government cannot indicate to one federal court that certain statements are trustworthy and accurate, and then argue to a jury in another federal court that those same assertions are hearsay.” *Id.*

In *U.S. v. Salerno*, 937 F.2d 797 (2d Cir.), *modified on other grounds*, 952 F.2d 623 (2d Cir. 1991), *rev’d on other grounds*, 502 U.S. 1056 (1992), the Second Circuit held that the trial court abused its discretion by not allowing the defendant to introduce as admissions the government’s statements in a prior prosecution against other individuals. In the previous case, the government had characterized the defendant as a “puppet on a string.” At his trial, the government characterized the defendant as a “bid-rigger.” The appellate court found prejudicial error in the trial court’s refusal to allow the defendant to introduce the government’s previous closing arguments because “[h]ad the jury viewed [the defendant] the way the government did in

the [previous] case, they might have concluded that his purpose was other than bid-rigging when he deposited the bids in the mail.” *Id.* at 811-12. “Perhaps [the defendant] was a culpable bid-rigger; perhaps he was a puppet on a string. The government, at different times, has urged both - - and the jury was entitled to know that, because the jury and not the government, must ultimately decide which he was.” *Id.* at 812. *See also U.S. v. Bakshinian*, 65 F. Supp. 2d 1104 (C.D. Cal. 1999) (finding prosecutor’s statement in closing argument in a co-defendant’s trial was a party admission, but waiting until trial to rule on its admissibility under Rules 402 and 403).

In a civil antitrust case, *U.S. v. A.T.& T. Co.*, 498 F. Supp. 353 (D. D.C. 1980), the court found that statements made by officials of agencies in the Executive Branch were admissions against the government. The statements were contained in briefs, testimony at hearings and proposed findings of fact. In response to the government’s argument that admissions should be limited to statements emanating from the Department of Justice, the court noted that the Department of Justice is merely counsel for the party and the party is the United States of America.

## **B. Admissions from Bills of Particulars**

In *U.S. v. GAF Corp.*, 928 F.2d 1253 (2d Cir. 1991), the defendants moved unsuccessfully to admit the government's original bill of particulars which was different from a later version upon which the government relied at trial. The appellate court reversed:

The same considerations of fairness and maintaining the integrity of the truth-seeking function of trials that led this Court to find that opening statements of counsel and prior pleadings constitute admissions also require that a prior inconsistent bill of particulars be considered an admission by the government in an appropriate situation. Although the government is not bound by what it previously has claimed its proof will show any more than a party which amends its complaint is bound by its prior claims, the jury is at least entitled to know that the government at one time believed, and stated, that its proof established something different from what it currently claims. Confidence in the justice system cannot be affirmed if any party is free, wholly without explanation, to make a fundamental change in its version of the facts between trials, and then conceal this change from the final trier of the facts.

*Id.* at 1260.<sup>18</sup>

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<sup>18</sup> It is perhaps necessary to point out the differences between a bill of particulars and an indictment, the latter of which is not a pleading of the government but the charge of a grand jury. In contrast, “[a] bill of particulars . . . is prepared, reviewed, and presented by an agent of the United States.” *U.S. v. GAF Corp.*, 928 F.2d 1253, 1261 (2d Cir. 1991).

### C. Admissions from Pretrial Proceedings

Statements made by the prosecution in pretrial proceedings, including pretrial detention hearings involving co-defendants, may be admissible under Fed. R. Evid. 801(d)(2)(B) and (D). *See, e.g., U.S. v. Paloscio*, 2002 WL 1585835 (S.D.N.Y. July 17, 2002) (unpublished memorandum and order) (admitting the government’s statements at a pretrial hearing and in submissions to the court about the role of a co-defendant). The prosecution also may lose its right to challenge a criminal defendant’s claim of legitimate expectation of privacy through its assertions and concessions pre-trial. *See, e.g., Steagald v. U.S.*, 451 U.S. 204 (1981); *U.S. v. Settegast*, 755 F.2d 1117 (5<sup>th</sup> Cir. 1985). The prosecution may not argue at a suppression hearing that the defendant did not own the drugs and thus lacked an expectation of privacy, then turn around and argue to the jury the drugs belonged to the defendant. *U.S. v. Issacs*, 708 F.2d 1365, 1367-68 (9<sup>th</sup> Cir. 1983); *cf. U.S. v. Erickson*, 732 F.2d 788, 792 (10<sup>th</sup> Cir. 1984).<sup>19</sup>

### D. Admissions from Search Warrants

In *U.S. v. Morgan*, 581 F.2d 933, 937 (D.C. Cir. 1978), the court reversed the defendant’s conviction because the trial court refused to admit statements made by an informant which were contained in an affidavit in support of a search warrant. Applying Fed. R. Evid. 801(d)(2)(B), the court found that “[t]he government [had] manifested its belief in the truth of the informant’s statements . . . by characterizing them as ‘reliable’ in a sworn affidavit to a United States magistrate.” *See also U.S. v. Warren*, 42 F.3d 647 (D.C. Cir. 1994) (officer’s statements in affidavit submitted in support of a search warrant admissible against the government under Fed. R. Evid. 801(d)(2)(B)); *see generally U.S. v. Ramirez*, 894 F.2d 565, 570 (2d Cir. 1990) (court noted in dicta that “when the government advances a statement of its agent in a judicial proceeding to obtain a search warrant, the government has adopted the content of the statement, and a criminal defendant may introduce the statement as a party admission under Fed. R. Evid. 801(d)(2)(B)”).

### E. Admissions by Informants

Government informants’ statements may be admissions of the government as a party-opponent where the informant’s statements were intended to establish a trusting relationship between him and the defendant and his statements were within the scope of his agency relationship with the government. *See, e.g., U.S. v. Branham*, 97 F.3d 835 (6<sup>th</sup> Cir. 1996); *but see U.S. v. Garza*, 448 F.3d 294, 298-99 (5<sup>th</sup> Cir. 2006) (court refused to admit government investigator’s report from another case containing his opinion regarding an officer’s credibility; finding that the results of the investigation had not been adopted by the Department of Justice); *U.S. v. Yildiz*, 355 F.3d 80, 82 (2d Cir. 2004) (“There is good reason, however, to distinguish sworn statements submitted to a judicial officer, which the government might be said to have adopted, and those that are not submitted to a court and, consequently, not adopted, for example,

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<sup>19</sup> The best way to handle this problem is by filing a motion in limine before trial to preclude the government from arguing to the jury that the defendant had a possessory interest in the drugs seized when such argument would be inconsistent with the government’s previous admissions at the suppression hearing.

statements contained in an arrest warrant . . . and an informant’s remarks.”); *U.S. v. Prevatte*, 16 F.3d 767, 779 (7<sup>th</sup> Cir. 1994) (agents of the government are supposedly disinterested in the outcome of a trial and are traditionally unable to bind the sovereign; therefore, their statements are not admissions of a party).

#### **F. Admissions in Writings**

Sometimes something an agent or expert working for the government writes is an admission. For example, in *U.S. v. Van Griffin*, 874 F.2d 634 (9<sup>th</sup> Cir. 1989), the court was faced with the question of the admissibility of a Department of Transportation Manual on the proper procedures for testing nystagmus. The defendant initially sought to introduce the manual to impeach a government witness but the witness testified that he had not relied upon or even ever heard of the manual. The appellate court ruled that the manual was not proper impeachment, but that the defendant could have introduced it to show the measures necessary for a reliable nystagmus test.

We do not say that every publication of every branch of government of the United States can be treated as a party admission by the United States under Fed.R.Evid. 801(d)(2)(D). In this case the government department charged with the development of rules for highway safety was the relevant and competent section of the government; its pamphlet on sobriety testing was an admissible party admission.

*Id.* at 638. Unfortunately for the defendant, the court also found that the exclusion was harmless error.<sup>20</sup>

#### **G. Admissions On Appeal**

In *U.S. v. Morales*, 737 F.2d 761 (8<sup>th</sup> Cir. 1984), the court held that because of its inconsistent positions concerning the defendant’s alleged disclaimer of knowledge of a key, the government lost its right on appeal to challenge the standing of the defendant.

We believe that the government should not be permitted to use at the suppression hearing appellant's alleged disclaimer to support a warrantless entry, then argue at trial that appellant's possession of the key supported constructive possession of the cocaine, and now on appeal argue that the disclaimer constituted abandonment to defeat an expectation of privacy.

*Id.* at 764.

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<sup>20</sup> Counsel should be aware of statements made by employees of the government that may be of use in litigation. For example, Special Agent James K. Murphy, Chief of the FBI Polygraph Unit, once stated, “The polygraph technique, when properly used by competent, well-trained examiners, possesses a high degree of accuracy.” James K. Murphy, *The Polygraph Technique: Past and Present*, FBI Law Enforcement Bulletin (June 1980).

As these examples should make crystal clear, the possibilities here are limitless. Always look for admissions in pre-trial motions, during argument throughout the course of the proceedings against your client, and in other related cases. Frequently, the government will call an informant to testify against your client, although the same prosecutor may have informed the court that the informant was less than candid during some hearing having to do with the informant's case. Try to read any transcripts of the informant's pleas and sentencing looking for these admissions and then move to introduce the transcripts during your cross-examination of the witness. Consider statements the prosecutors have made about experts they have used in the past who might be appearing on behalf of your client in this case.<sup>21</sup> Also, look for admissions the non-lawyer agents of the government have made in other cases. This includes the police agents, the customs agents, the IRS agents, etc. It also includes the professional chemists, fingerprint experts, accountants, etc. Finally, at trial, be alert for any admissions you can use on appeal.

#### **H. A Non-Evidentiary Argument: Judicial Estoppel**

You might also try arguing that a statement is binding on the government under the theory of judicial estoppel. "This doctrine 'prevents a party from asserting a position in a legal proceeding that is contrary to a position previously taken by him in the same or some earlier legal proceeding.'" Rand G. Boyers, Comment, *Precluding Inconsistent Statements: The Doctrine of Judicial Estoppel*, 80 Nw. U. L. Rev. 124 (1986) (footnotes omitted). See also Hollander & Bergman, *The Everytrial Criminal Defense Resource Book*, § 29:4; Anne Bowen Poulin, *Prosecutorial Inconsistency, Estoppel, and Due Process: Making the Prosecution Get Its Story Straight*, 89 Cal. L. Rev. 1423 (2001). As a general principle, the doctrine of judicial estoppel bars a party from taking inconsistent positions.

Courts have at least recognized the possibility that judicial estoppel may apply to the government in a criminal case. Assuming for purposes of argument that the principle can operate against the government and preclude it from taking inconsistent positions in a criminal case, the First Circuit found in *U.S. v. Levasseur*, 846 F.2d 786, 792 (1st Cir. 1988), that the government had not "played fast and loose with the courts." Therefore, the doctrine of judicial estoppel did not bar it from alleging certain predicate acts for a RICO prosecution after previously promising not to retry the defendant on those charges. *Id.* at 787.

In *U.S. v. McCaskey*, 9 F.3d 368 (5th Cir. 1993), the government initially alleged that the drug at issue was cocaine hydrochloride. Later, the government claimed that the drug was cocaine base for which the penalties were substantially greater. The defendant argued that the concept of judicial estoppel prevented the government from changing its position. Although the defendant was not successful, the court was concerned about the issue of judicial integrity.

Assuming without deciding that judicial estoppel can apply to the government in criminal cases, we believe that the underlying purposes of the doctrine are the

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<sup>21</sup> In a case involving one of the authors, an Assistant United States Attorney referred to a defense expert as "the world's leading expert" in his field. Needless to say this will come back to haunt him and the government he represents.

same in both civil and criminal litigation -- to protect the integrity of the judicial process and to prevent unfair and manipulative use of the court system by litigants. Cases have suggested that the integrity of the judicial process is safeguarded mainly by preventing a party from abandoning a position he “successfully maintained” in a prior proceeding or earlier in the same proceeding.

*Id.* at 379. *See also U.S. v. Lehman*, 756 F.2d 725, 728 (9<sup>th</sup> Cir. 1985) (assuming judicial estoppel may be applied against the government in a criminal case, it was inapplicable when government did not advocate mutually exclusive positions); *but see Nichols v. Scott*, 69 F.3d 1255 (5<sup>th</sup> Cir. 1995) (discussion critical of applying judicial estoppel in criminal cases particularly against the government); Anne Bowen Poulin, *Prosecutorial Inconsistency, Estoppel, and Due Process: Making the Prosecution Get Its Story Straight*, 89 Cal. L. Rev. 1423 (2001); Kimberly J. Winbush, *Judicial Estoppel in Criminal Prosecution*, 121 A.L.R.5th 551.

If the court rules that application of judicial estoppel is inappropriate, the prior inconsistent statement may still be used as an admission, or, under the appropriate circumstances, to impeach a witness. *See, e.g., USLIFE Corp. v. U.S. Life Ins. Co.*, 560 F. Supp. 1302, 1305 (N.D. Tex. 1983) (where the court held the prior inconsistent position did not rise to the level of judicial estoppel, that party’s statements remained available as evidence and could be introduced as party admissions at trial).

A variation on the doctrine of judicial estoppel -- implicating the Due Process Clause -- may arise in separate prosecutions of two or more defendants arising out of the same event. In those circumstances, the government sometimes tries to use inconsistent, irreconcilable theories to secure convictions against the different defendants. If the government tries to do that to your client, argue that such inherently contradictory positions violate your client’s rights under the Due Process Clause. For example, in *Smith v. Groose*, 205 F.3d 1045 (8<sup>th</sup> Cir. 2000), the Eighth Circuit reversed a state defendant’s murder conviction finding that such a tactic violated the defendant’s due process rights. That court stated:

The State’s duty to its citizens does not allow it to pursue as many convictions as possible without regard to fairness and the search for truth. . . . We do not hold that prosecutors must present precisely the same evidence and theories in trials for different defendants. Rather, we hold only that the use of inherently factually contradictory theories violates the principles of due process. . . . To violate due process, an inconsistency must exist at the core of the prosecutor’s cases against defendants for the same crime.

*Id.* at 1051-52; *see also Thompson v. Calderon*, 120 F.3d 1045, 1058-59 (9<sup>th</sup> Cir. 1997), *vacated on other grounds sub nom. Calderon v. Thompson*, 523 U.S. 538 (1998) (plurality of Ninth Circuit held that the state of California violated a defendant’s due process rights by arguing at defendant’s trial that he alone committed a murder, while arguing at a later trial that another defendant actually committed the murder); *Drake v. Kemp*, 762 F.2d 1449, 1479 (11<sup>th</sup> Cir. 1985) (en banc) (Clark, J., specially concurring) (after exhaustively recounting the evidence regarding what he viewed as totally inconsistent government theories for the same crime, Judge Clark

concluded: “[t]he state cannot divide and conquer in this manner. Such actions reduce criminal trials to mere gamesmanship and rob them of their supposed purpose of a search for truth.”).

The California Supreme Court recently reached a similar conclusion in *In re Sakarias*, 106 P.3d 931, 25 Cal.Rptr.3d 265 (Cal. 2005), holding that the prosecution, by arguing two factually inconsistent theories at the co-defendants’ severed capital trials, violated both the U.S. and California Constitutions. The Court stated:

By intentionally and in bad faith seeking a conviction or death sentence for two defendants on the basis of culpable acts for which only one could be responsible, the People violate “the due process requirement that the government prosecute fairly in a search for truth.” (*Smith [v. Groose*, 205 F.3d 1045, 1053 (8<sup>th</sup> Cir. 2000)].) In such circumstances, the People’s conduct gives rise to a due process claim (under both the United States and California Constitutions) similar to a claim of factual innocence. Just as it would be impermissible for the state to punish a person factually innocent of the charged crime, so too does it violate due process to base criminal punishment on unjustified attribution of the same criminal or culpability-increasing acts to two different persons when only one could have committed them. In that situation, we know that *someone* is factually innocent of the culpable acts attributed to both. (See [Anne Bowen Poulin, Prosecutorial Inconsistency, Estoppel, and Due Process: Making the Prosecution Get Its Story Straight, 89 Cal. L. Rev. 1423, 1425 (2001)] (“When the prosecution advances a position in the trial of one defendant and then adopts an inconsistent position in the trial of another on the same facts, the prosecution is relying on a known falsity”).)

*Id.* at 282.<sup>22</sup>

## 5. MAKE SURE YOU DO NOT HAVE TO EAT YOUR WORDS.

Clearly, an attorney may be the agent of his client for purposes of Fed. R. Evid. 801(d)(2)(C) and (D). See, e.g., *U.S. v. Buonocore*, 416 F.3d 1124, 1134 (10<sup>th</sup> Cir. 2005) (holding comments made by defense counsel during sentencing can constitute admissions); *U.S. v. Amato*, 356 F.3d 216 (2<sup>d</sup> Cir. 2004) (admitting against the defendant under Fed. R. Evid. 801(d)(2)(D) his attorney’s statement in a letter to the court); *U.S. v. McClellan*, 868 F.2d 210, 215 n.9 (7<sup>th</sup> Cir. 1989); see generally Beth Bates Holliday, Admissibility as “not hearsay” of statement by party’s attorney under Federal Rules of Evidence 801(d)(2)(c) or 801(d)(2)(d), 117 A.L.R. Fed. 599.

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<sup>22</sup> In 2005, the United States Supreme Court decided *Bradshaw v. Stumpf*, 545 U.S. 175 (2005), in which the government argued inconsistent theories. In the sentencing phase of Stumpf’s trial, the government argued Stumpf was the triggerman. In a co-defendant’s separate trial, held afterwards, the government argued that the co-defendant was the killer. The Court did not decide the due process issue but remanded the case for a determination of the impact of the prosecution’s inconsistent positions during the sentencing phase.

An important distinction needs to be made here between an attorney's judicial admission, which, like a stipulation, can bind a party, and an attorney's evidentiary admission that is admissible against the party. A judicial admission is an express waiver made in court or before trial by the party or his attorney conceding for the purposes of the trial that the truth of some alleged fact is to be taken for granted. The party with the burden of proof is, therefore, relieved of that burden and the fact is deemed proved. 9 *Wigmore, Evidence* 2588 (Chadbourn rev. 1981). Therefore, the words that cross counsel's lips can bind their clients to propositions that relieve the prosecution of its burden to prove essential elements of the case. "[A] clear and unambiguous admission of fact made by a party's attorney in an opening statement in a civil or criminal case is binding upon the party." *U.S. v. Blood*, 806 F.2d 1218, 1221 (4<sup>th</sup> Cir. 1986). The court in *Blood* also noted *in dicta* that statements by a government attorney during voir dire would be binding against the government if the statements constituted a clear and unambiguous admission. See also *U.S. v. Bentson*, 947 F.2d 1353, 1356 (9<sup>th</sup> Cir. 1991) (defense counsel's admission during his closing argument that Bentson did not file valid tax returns for two years, meant that Bentson could not claim on appeal that the government failed to prove he did not file valid tax returns for those years).

In *U.S. v. McKeon*, 738 F.2d 26, 29 (2d Cir. 1984), the court discussed extensively when statements made in court by counsel may be admissible against a client. In that case the defendant's attorney had made an opening statement in a previous trial, in which he explained some evidence he intended to introduce. That case resulted in a mistrial before the defense case began. By the time of the retrial, counsel had learned the facts were different from what he had previously thought, and he changed his opening statement accordingly. At the prosecutor's request, the trial judge admitted the defense attorney's statement from the opening in the previous trial as an admission of a party opponent and the appellate court affirmed. That court was unwilling, however, to extend this theory to all jury arguments without some reservations.

[W]e circumscribe the evidentiary use of prior jury argument. Before permitting such use, the district court must be satisfied that the prior argument involves an assertion of fact inconsistent with similar assertions in a subsequent trial. Speculations of counsel, advocacy as to the credibility of witnesses, arguments as to weaknesses in the prosecution's case or invitations to a jury to draw certain inferences should not be admitted. The inconsistency, moreover, should be clear and of a quality which obviates any need for the trier of fact to explore other events at the prior trial. The court must further determine that the statements of counsel were such as to be the equivalent of testimonial statements by the defendant.

*Id.* at 32.

In a Seventh Circuit case, the court voiced its concern that the "unique nature of the attorney-client relationship, however, demands that a trial court exercise caution in admitting statements that are the product of this relationship." *U.S. v. Harris*, 914 F.2d 927, 931 (7<sup>th</sup> Cir.

1990). In *Harris*, a previous defense counsel met with a witness who indicated he had been mistaken as to the identity of the man he had seen in a garage. The statements defense counsel had made to this witness came out during his cross-examination and effectively undercut the defendant's theory at the trial. The trial court permitted the testimony about the previous attorney's statements, holding that he was an agent of the defendant acting within the scope of his agency and that the statements were not hearsay under Rule 801(d)(2)(D). The appellate court was troubled by the injection of counsel's statements into the trial, noting that "the free use of prior statements may deter counsel from vigorous and legitimate advocacy" on behalf of his client. Therefore, a more exacting standard must be demanded for admission of statements by attorneys under Rule 801(d)(2)(D), "in order to avoid trenching upon other important policies." *Harris*, 914 F.2d at 931, citing *McKeon*, 738 F.2d at 32. After voicing this concern for the attorney-client privilege, however, that court found that Harris's lawyer's statements were properly admitted.

*U.S. v. Valencia*, 826 F.2d 169, 172 (2d Cir. 1987), is also instructive. In that case the court raised the concern that the "routine use of attorney statements against a criminal defendant risks impairment of the privilege against self-incrimination, the right to counsel of one's choice and the right to effective assistance of counsel." In *Valencia*, the government sought to admit statements defense counsel made during informal conversations with the prosecutor. *Id.* Lawyers' statements during representation of their clients appear to be particularly troublesome in tax cases. See, e.g., *U.S. v. Martin*, 773 F.2d 579 (4<sup>th</sup> Cir. 1985) (statements defendant's attorney made to IRS were properly admitted); *U.S. v. Ojala*, 544 F.2d 940 (8<sup>th</sup> Cir. 1976) (same). Of course this sort of party-opponent admission is still subject to the trial court's Rule 403 balancing.

## 6. USE THAT LIE.

Fed. R. Evid. 608(b) provides:

Specific instances of conduct. Specific instances of conduct of a witness, for the purpose of attacking or supporting the witness's credibility, other than conviction of crime as provided in Rule 609, may not be proved by extrinsic evidence. They may, however, in the discretion of the court, if probative of truthfulness or untruthfulness, be inquired into on cross-examination of the witness (1) concerning the witness's character for truthfulness or untruthfulness or (2) concerning the character for truthfulness or untruthfulness of another witness as to which character the witness being cross-examined has testified. The giving of testimony, whether by an accused or by any other witness, does not operate as a waiver of the accused's or the witness's privilege against self-incrimination when examined with respect to matters which relate only to credibility.

Fed. R. Evid. 608(b) allows you to impeach the credibility of a witness about specific acts that are probative of untruthfulness, whether or not they resulted in a conviction, an arrest, or any law enforcement action at all. *U.S. v. Jones*, 900 F.2d 512 (2d Cir. 1990). You need only a

good faith basis for believing the dishonest conduct occurred. Courts have found perjury, fraud, swindling, forgery, bribery,<sup>23</sup> embezzlement, and acts of theft to be probative of untruthfulness. *See, e.g., Varhol v. National R.R. Passenger Corp.*, 909 F.2d 1557 (7<sup>th</sup> Cir. 1990); *U.S. v. Leake*, 642 F.2d 715, 718 (4<sup>th</sup> Cir. 1981). Fed. R. Evid. 608(b) does not permit the introduction of extrinsic evidence; you must draw out your evidence from the witness on cross-examination. If the witness denies the acts, however, you can make those denials look like lies through effective impeachment. Use factual detail and a manner and tone that transmit the truth of your allegations.

Here is an example of this type of cross:

- Q. Mr. Smith, when you began working as a pilot for the airline company you had to agree to certain conditions, didn't you?
- Q. You had certain requirements to keep your job?
- Q. You had to agree not to use any drugs or alcohol within a certain time period before flying?
- Q. And you told the company that you wouldn't use any drugs or alcohol during the prohibited time period, didn't you?
- Q. But on at least one occasion you used cocaine just two hours before flying?
- Q. So you lied to your employer?
- Q. When you reported for work the day you had used cocaine, your supervisor asked if you had been using any drugs?
- Q. You denied that you had?

Although the trial court has discretion to limit cross-examination, argue that the cross-examination of this witness is critical to your case.

## **7. USE THE DOCUMENTS THE PROSECUTION WITNESSES RELY ON.**

### **A. Obtain the Documents the Prosecutor Uses to Refresh their Witness's Memory While Testifying**

When the prosecution shows a witness a document to refresh his memory while testifying, you are entitled to inspect it, to cross-examine the witness about it, and to introduce those portions that relate to the witness's testimony.<sup>24</sup>

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<sup>23</sup> In the Third Circuit, bribery is not considered an act of dishonesty under 608(b). *U.S. v. Rosa*, 891 F.2d 1063 (3d Cir. 1989). *Cf. U.S. v. Hurst*, 951 F.2d 1490 (6<sup>th</sup> Cir. 1991) (government permitted to cross-examine the defendant about the fact that his guilty plea for attempted obstruction of justice involved attempting to bribe a public official to make false official records because subordination of perjury was probative of truthfulness).

<sup>24</sup> If the document is a prior statement of the testifying witness in a federal criminal case, counsel is not entitled to the document until after the witness completes his direct examination. *See* 18 U.S.C. § 3500 (a) regarding prosecution witnesses and Fed. R. Crim. P. 26.2 regarding both defense and prosecution witnesses. "[W]hen the prosecution elects not to comply," the court "shall" strike the witness's testimony, or if the court "in its discretion determines that the interests of justice so require," it shall declare a mistrial. 18 U.S.C. § 3500 (d).

Sometimes you get lucky. A prosecution witness approaches the stand clutching a document. You do not know what the document is, what it says, whether you want it or need it. You have an urge to demand to see it before the witness begins testifying. Suppress that urge! Chances are good that the witness will look at it as soon as counsel asks the first question. Then, it's yours. At that point, ask to see the document immediately.<sup>25</sup> If necessary, request that a copy be made for you before the witness continues with his testimony so you will have it during the testimony. Finally, demand that the witness stop looking at the document until counsel demonstrates that the witness does not have any present memory. If you have jumped the gun and requested the document before the witness begins testifying, you can still demand it but that would relegate the document to one the witness used to refresh his recollection *before* testifying. This distinction gives the judge discretion to withhold it from you.

It is up to you to decide whether to introduce all or part of the relevant portions of the document "which relate to the testimony of the witness." *See* Fed. R. Evid. 612.<sup>26</sup> Keep in mind that if you spend time discussing it with opposing counsel and the court in front of the jury, and

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<sup>25</sup> Remember, as noted in the previous footnote, if you are in federal court, the only restriction on your right to see the document immediately is if it is otherwise producible as a Jencks Act statement of that witness. Under the Jencks Act, the prosecutor is required to produce such statements after the witness has testified on direct -- not before. (Apparently, prosecutors in some jurisdictions argue that defense counsel must return the Jencks Act materials to them after cross-examination of the witness. The Jencks Act contains no such provision and merely because the prosecutor may tell you that is so does not make it true.) The introduction of Rule 612 specifically excludes Jencks Act statements from its provisions. The document is not necessarily the statement of the testifying witness covered by the Jencks Act. It may be someone else's statement, a photograph, a diary, a calendar. In any event, find out what it is.

<sup>26</sup> Fed. R. Evid. 612 provides:

Writing Used to Refresh Memory

Except as otherwise provided in criminal proceedings by section 3500 of title 18, United States Code, if a witness uses a writing to refresh memory for the purpose of testifying, either--

(1) while testifying, or

(2) before testifying, if the court in its discretion determines it is necessary in the interests of justice,

an adverse party is entitled to have the writing produced at the hearing, to inspect it, to cross-examine the witness thereon, and to introduce in evidence those portions which relate to the testimony of the witness. If it is claimed that the writing contains matters not related to the subject matter of the testimony the court shall examine the writing in camera, excise any portions not so related, and order delivery of the remainder to the party entitled thereto. Any portion withheld over objections shall be preserved and made available to the appellate court in the event of an appeal. If a writing is not produced or delivered pursuant to order under this rule, the court shall make any order justice requires, except that in criminal cases when the prosecution elects not to comply, the order shall be one striking the testimony or, if the court in its discretion determines that the interests of justice so require, declaring a mistrial.

then no one introduces it, the jury will become curious. You can approach the bench to make your initial request for the document and request that the jury leave the room before having the document retrieved if you are concerned that it will be a document you will not want to introduce and you do not want the jury to hold that against your client.

### **B. Obtain the Documents the Prosecutor Used to Refresh their Witness's Memory Before Testifying**

The common law only required attorneys to turn over writings used to refresh the witness's memory while testifying at trial. Fed. R. Evid. 612 expanded the common law approach to require the disclosure of writings used to refresh memory *before* the witness testified. Some courts have interpreted Rule 612 to mean that all materials reviewed by a witness before testifying fall into this category, even without a showing that the materials actually refreshed the witness's memory. *See, e.g., Berkey Photo, Inc. v. Eastman Kodak Co.*, 74 F.R.D. 613 (S.D.N.Y. 1977) (finding that any materials reviewed by a witness prior to testifying that may have an impact on his testimony qualify as memory-refreshment documents subject to inspection); *but see U.S. v. Darden*, 70 F.3d 1507, 1540 (8<sup>th</sup> Cir. 1995) ("Access is limited to those writings that arguably have an impact upon the testimony of the witness.").

At or near the beginning of your cross-examination you should always ask the witness what documents he reviewed in preparation for his testimony. If the witness acknowledges reviewing any writings, ask the court to order the opposing side to give those documents to you before proceeding any further with your cross-examination. In those circumstances, the court must decide whether it is "necessary in the interests of justice" for the opposing side to turn the document over to you. In a criminal case, also argue that your client's Sixth Amendment right to cross-examination requires that you be permitted to examine the document and thus, that the "interests of justice" mandate its disclosure.

The court may conclude that you are not entitled to the entire document but only those portions the witness actually used or that relate to the same subject. *See, e.g., U.S. v. Larranaga*, 787 F.2d 489, 501 (10<sup>th</sup> Cir. 1986) (Rule 612 requires only "disclosure of the passage actually used by the witness, and other portions relating to the same subject matter.").

Opposing counsel may argue that the document his or her witness reviewed before testifying contained attorney work product that normally would not be disclosable. The tension between Rule 612 and the work product doctrine has not been resolved in any consistent manner. In *Parry v. Highlight Industries*, 125 F.R.D. 449 (W.D. Mich. 1989), however, the court recommended using a three-factor test for evaluating whether such documents must be disclosed. In those circumstances, the trial court should conduct an *in camera* inspection of the documents considering: (1) whether witness coaching had occurred; (2) whether the documents constituted fact or opinion work product; and (3) whether the request for inspection constituted a "fishing expedition." *Id.* at 452. If the prosecutor claims work product privilege in your case, argue that the prosecution has waived that privilege by showing the document to the witness as part of its trial preparation. *See, e.g., U.S. v. Nobles*, 422 U.S. 225 (1975) (defendant waived the work product privilege when his investigator testified concerning statements by government witnesses

recorded in the investigator's report). To the extent you can argue that the factors such as those set out in *Parry* are not present in your case, do so.

If the court orders the prosecution to turn over the documents and the prosecutor refuses to do so, Rule 612 specifically provides that "when the prosecution elects not to comply," the court "shall" strike the witness's testimony, or if the court "in its discretion determines that the interests of justice so require," it shall declare a mistrial.

## **8. DO NOT LET THE PROSECUTOR USE YOUR DOCUMENTS.**

Be careful about what you use to refresh the recollection of your witnesses, keeping in mind that the rule specifically permits the prosecutor to "inspect it, to cross-examine the witness thereon, and to introduce in evidence those portions which relate to the testimony of the witness." Fed. R. Evid. 612. Be particularly cautious about using diaries and calendars to refresh recollection. These types of documents often contain notes that could be prejudicial to your client.

If the prosecution obtains a document one of your witnesses used to refresh that witness's recollection and then introduces portions of it, you are entitled to a limiting instruction pursuant to Fed. R. Evid. 105 if the document is admissible only on the issue of credibility.<sup>27</sup>

Clearly, the writing should not be given substantive effect in every instance. Doing so would undermine the usual modes of introducing evidence and would permit by-passing of best evidence, authentication and hearsay rules in many instances. Rather, Rule 612 must be understood as allowing the jury to examine the writing (1) as a guide to assessing the credibility of the witness and (2) to the extent that it would otherwise have been admissible, for its normal evidential value. An instruction to that effect should be given on request.

(footnote omitted) 4 Hon. Jack B. Weinstein and Margaret A. Berger, *Weinstein's Federal Evidence* ' 612.07[2] at 612-43 (2d. ed. 1997, Hon. Joseph M. McLaughlin, ed.).

Think about what you show to your witness both before and during trial to avoid discovery of documents. Once the witness has used it, other grounds for exclusion may fall by the wayside. For example, a document that is subject to a common law privilege may become admissible. In a civil case, *Leybold-Heraeus Technologies, Inc. v. Midwest Instrument Co., Inc.*, 118 F.R.D. 609 (E.D. Wis. 1987), the trial court held that a company could not "allow their

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<sup>27</sup> Fed. R. Evid. 105 states:

When evidence which is admissible as to one party or for one purpose but not admissible as to another party or for another purpose is admitted, the court, upon request, shall restrict the evidence to its proper scope and instruct the jury accordingly.

witnesses to review [privileged] documents to refresh their recollection for the purpose of testifying, without allowing [opposing counsel] to inspect the documents prior to trial.” *Id.* at 614–15; *see also U.S. v. Nobles*, 422 U.S. 225 (1975) (defendant waived the work product privilege when his investigator testified concerning statements by government witnesses recorded in the investigator’s report).

## **9. USE DEFENSE EXPERTS IN AID OF CROSS-EXAMINATION.**

You are about to cross-examine the prosecution’s expert with a learned treatise, relying on Fed. R. Evid. 803 (18). What do you do if the expert refuses to admit that the particular treatise is accepted in the field as a reliable authority? Advise the court that you cannot effectively confront and cross-examine the witness without questioning him about the treatise. Request that you be allowed to call your expert in the middle of the prosecution expert’s testimony, qualify your witness and ask him the questions necessary under Fed. R. Evid. 803(18); i.e., is the treatise established as a reliable authority by experts in his field? Request that you then be permitted to recall the prosecution’s expert and cross-examine him, this time using the learned treatise that is now admissible. Of course, you can call the prosecution’s witness as an adverse witness in your case, but the cross-examination is much more effective if you can do it immediately following the prosecutor’s direct examination and your expert’s examination that established the foundation for the admissibility of the treatise, and, hence, your cross-examination. No rule prohibits this procedure, and it saves time and money because you need not recall the prosecution’s expert during your case. You will want to recall your expert at the appropriate time in your case. This procedure puts your theory squarely before the jury at an early stage of the trial and again during your case.

## **10. USE EXPERTS IN AID OF AN OBJECTION TO THE PROSECUTION’S EVIDENCE.**

One way to use a defense expert is in aid of an objection to the introduction of evidence. For example, the prosecutor is introducing documents that you believe do not fall within the business records exception of the hearsay rule. Fed. R. Evid. 803 (6). Object and advise the court that you need to call a witness to support your objection. Call an expert on these particular types of records to establish that the records are not admissible. This argument and your expert’s testimony will be outside the presence of the jury; but if you win the objection, the jury will never see the inculpatory evidence. If you wait to challenge the records until your expert testifies about their unreliability, the court is likely to rule that the jury can see the documents and determine what weight to give them. Needless to say, it is always beneficial to exclude inculpatory evidence. Other examples could include using an expert in aid of your objection to drug analysis evidence, drug weight evidence, or child testimony on competency grounds.