

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

**Omaha, Nebraska**

**May 28, 2015**

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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

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.<sup>2</sup> Rule 806 provides:

When a hearsay statement — or a statement described in Rule 801(d)(2)(C), (D), or (E) — has been admitted in evidence, the declarant’s credibility may be attacked, and then supported, by any evidence that would be admissible for those purposes if the declarant had testified as a witness. The court may admit evidence of the declarant’s inconsistent statement or conduct, regardless of when it occurred or whether the declarant had an opportunity to explain or deny it. If the party against whom the statement was admitted calls the declarant as a witness, the party may examine the declarant on the statement as if on cross-examination.

Rule 806 is a powerful weapon. You can use it to discredit declarants whose statements come in for the truth through other witnesses<sup>3</sup> and to rehabilitate the credibility of declarants, including your client.<sup>4</sup> You must use Rule 806 carefully because there are limitations and pitfalls, but it is worth the effort.

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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).

The rule provides for attacking the credibility of the declarant, not the messenger of the out-of-court statements.<sup>5</sup> “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. *See generally U.S. v. Sitzmann*, 2014 WL 6476696, \*1, n. 3, \_\_\_ F. Supp. 3d \_\_\_ (D.D.C. 2014) (“Under Rule 806 of the Federal Rules of Evidence, the credibility of a Rule 801(d)(2) hearsay declarant—including a defendant’s co-conspirator, whose out-of-court statements were made in furtherance of the conspiracy, see Fed. R. Evid. 801(d)(2)(E)—may be impeached ‘by any evidence that would be admissible for those purposes if the declarant had testified as a witness.’”); *U.S. v. Delvi*, 275 F. Supp. 2d 412 (S.D. N.Y. 2003) (after admitting statements of victim as “excited utterances” under Rule 803(2), the court permitted defendants to impeach him under Rule 806 through evidence of the victim’s criminal history, his drug use prior to making the admitted statement, and his later inability to identify a defendant from a photo array); Fred W. Bennett, *How to Administer the “Big Hurt” in a Criminal Case: The Life and Times of Federal Rule of Evidence 806*, 44 Cath. U. L. Rev. 1135 (1995).

Rule 806 offers two advantages: (1) impeachment evidence may be drawn from “any prior or subsequent inconsistent statements,” *U.S. v. Hale*, 422 U.S. 171, 176 (1975)

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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. Flore*, 2011 WL 1100137, at \*1 (N.D. Cal. 2011) (not reported in F. Supp. 2d) (“[T]he government’s *Brady/Giglio* obligations extend to impeachment of non-testifying coconspirator witnesses under Rule 806”); *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 a co-conspirator whose out of court statements were admitted at trial; court analyzed the motion under the *Brady* standard but found that the withheld information was not material). *But see U.S. v. Green*, 178 F.3d 1099, 1109 (10th Cir. 1999) (finding *Giglio*—unlike *Brady*—does not apply to witnesses the government does not call at trial).

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).

(emphasis added); and (2) because the declarant is generally not in court, the declarant does not get 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 hearsay 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 (7<sup>th</sup> Cir. 1991), 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

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<sup>6</sup> Fed. R. Evid. 609(a) states:

(a) In General. The following rules apply to attacking a witness's character for truthfulness by evidence of a criminal conviction:

(1) for a crime that, in the convicting jurisdiction, was punishable by death or by imprisonment for more than one year, the evidence:

(A) must be admitted, subject to Rule 403, in a civil case or in a criminal case in which the witness is not a defendant; and

(B) must be admitted in a criminal case in which the witness is a defendant, if the probative value of the evidence outweighs its prejudicial effect to that defendant; and

(2) for any crime regardless of the punishment, the evidence must be admitted if the court can readily determine that establishing the elements of the crime required proving — or the witness's admitting — a dishonest act or false statement.

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 (10<sup>th</sup> 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 (2<sup>d</sup> Cir. 2005) ("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). *See also U.S. v. Greenidge*, 495 F.3d 85, 98 (3<sup>d</sup> Cir. 2007) (prior conviction admitted under Rule 806 was not so similar to current charge such that unfair prejudice would substantially outweigh its probative value regarding credibility).

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

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); *U.S. v. Gibson*, 84 F. Supp. 2d 784, 789 (S.D. W.V. 2000) (inconsistent statements by declarant to sister admissible to impeach the former testimony of the now deceased declarant).<sup>8</sup>

You may use Rule 806 in rather creative ways. In *People v. Rosoto*, 373 P.2d 867, 885 (Cal. 1962), modified on other grounds, 401 P.2d 220 (Cal. 1965), the defense read into evidence the testimony of a witness who had testified at a previous trial.<sup>9</sup> The prosecution then called the court 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.*

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 exculpatory post-arrest statements of a non-testifying co-conspirator to impeach the

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<sup>8</sup> Remember: To be inconsistent, statements "need not be diametrically opposed." *U.S. v. Trzaska*, 111 F.3d 1019, 1024 (2d Cir. 1997) (citation and internal quotation marks omitted). The inconsistency requirement is satisfied "if there is 'any variance between the statement and the testimony that has a reasonable bearing on credibility,'" *id.* at 1025 (quoting Charles A. Wright & Victor J. Gold, 28 *Federal Practice and Procedure* § 6203, at 514 (1993)) (alterations omitted), or, if the jury could " 'reasonably find that a witness who believed the truth of the facts testified to would have been unlikely to make a ... statement of this tenor,'" *id.* (quoting John W. Strong et al., 1 *McCormick on Evidence* § 34, at 115 (4th ed. 1992)).

<sup>9</sup> The witness had died after the first trial through no fault of the defendant.

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 reputation evidence of the declarant's character for dishonesty. See Fed. R. Evid. 608(a).<sup>10</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 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

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<sup>10</sup> Fed. R. Evid. 608(a) states:

(a) Reputation or Opinion Evidence. A witness's credibility may be attacked or supported by testimony about the witness's reputation for having a character for truthfulness or untruthfulness, or by testimony in the form of an opinion about that character. But evidence of truthful character is admissible only after the witness's character for truthfulness has been attacked.

have been permitted to question a prosecution witness about the reputation of the hearsay declarant whose statements he was repeating.

## 5. Perception

You may be able to impeach a hearsay declarant with evidence that the declarant could not accurately perceive what she spoke about in her hearsay statement. Evidence that the declarant was intoxicated or not wearing her glasses or hearing aid at the relevant time may affect her credibility in the eyes of the jury. See Fred W. Bennett, *How to Administer the “Big Hurt” in a Criminal Case: The Life and Times of Federal Rule of Evidence 806*, 44 Cath. U. L. Rev. 1135, 1143-44 (1995).

## 6. Memory

Similarly, you may have an absent hearsay declarant who has memory problems. You may be able to call a witness who can testify that the declarant is suffering from memory loss or that the declarant could not remember any details about the incident when the witness spoke to them a short time afterwards. Bennett, 44 Cath. U. L. Rev. at 1145-46.

## 7. Communication

Rule 806 allows impeachment of a hearsay declarant’s ability to communicate. For example, you may challenge the reliability of the statement through testimony concerning the declarant’s intellectual capacity or vocabulary. The documentary movie *Murder on a Sunday Morning* provides such an example – although it was the defense impeaching their own client’s alleged statement. (See Part C below.) In that case, the prosecution introduced a written “confession” by the juvenile defendant. The defense cross-examined the detective about particular words used in the statement, arguing later in closing that the defendant would never have used those words and that instead the detective supplied them.

## 8. 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. Although Lechoco was first tried before the adoption of the Federal Rules of Evidence, the Court noted in a footnote:

Should this issue present itself on further proceedings, the district court may be guided by Federal Rule of Evidence, Rule 806. The defendant’s

statements to his psychiatrist fall within the statement to a physician exception to the hearsay rule embodied in Rule 803(4). As such, Mr. Lechoco's credibility was open to attack under Rule 806. The prosecutor's vigorous cross-examination represents the type of attack on credibility contemplated by the term "otherwise" as contained in Rule 608(a). In light of this attack, the defendant is permitted by Rule 806 to present supporting credibility evidence notwithstanding his exercise of his Fifth Amendment rights.

*Id.* at 89, n.6.

### **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>11</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. See generally *U.S. v. Uvino*, 590 F. Supp. 2d 372, 375 (E.D. N.Y. 2008) (Weinstein, J.) ("Evidence of prior dishonest acts of the declarants, including participation in an armed robbery and fabrication of a story to explain the robbery, is admissible [under Rule 806] so that the jury can weigh it in considering whether the exclamations of the alleged victims heard on the tape were in part or whole a fabrication.").

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<sup>11</sup> Fed. R. Evid. 608(b) provides:

(b) Specific Instances of Conduct. Except for a criminal conviction under Rule 609, extrinsic evidence is not admissible to prove specific instances of a witness's conduct in order to attack or support the witness's character for truthfulness. But the court may, on cross-examination, allow them to be inquired into if they are probative of the character for truthfulness or untruthfulness of:

(1) the witness; or

(2) another witness whose character the witness being cross-examined has testified about.

By testifying on another matter, a witness does not waive any privilege against self-incrimination for testimony that relates only to the witness's character for truthfulness.

At least two circuits take a 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. *See also U.S. v. Little*, 2012 WL 2563796 (N.D. Cal. 2012) (not reported in F. Supp. 2d) (following *White* and *Saada*); *see generally* Lt. Gregory J. Gianoni, *Lose the Battle, Win the War: The Use, Dangers, and Problems Surrounding Rules 806 and 608(b), and How They Can be Fixed*, 20 Suffolk J. Trial & App. Advoc. 1 (2015); Alan D. Hornstein, *In the Horns of an Evidentiary Dilemma: The Intersection of Federal Rules of Evidence 806 and 608(B)*, 56 Ark. L Rev. 543 (2003).

### **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 the credibility of your client's out-of-court statements admitted under Rule 801(d)(2)(A) and (B), some courts have held that it does apply to your client's statements when introduced under those rules. 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 concerning proposed Rule 806 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 that the government had introduced. 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)); *U.S. v. Botti*, 2010 WL 745043 \*2 (D. Conn. 2010) (unpublished opinion) ("That attack on credibility may, as *Shay* holds, be made by the

defendant himself as party-opponent, availing himself under Rule 806 of any admissible evidence available to him, whether or not he takes the stand and testifies.”).

## **2. WATCH OUT! YOUR CLIENT MAY BE IMPEACHED EVEN IF SHE NEVER TESTIFIES**

### **A. Don't Introduce Your Client's Hearsay Statements**

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 case. 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 *U.S. v. Greenidge*, 495 F.3d 85 (3d Cir. 2007) (defendant's prior conviction for theft admissible under Rule 806 after defense attorney elicited the defendant's exculpatory out-of-court statement); *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); David Farnham, *Impeaching the Hearsay Declarant: Rule 806 Can Be a Trap for the Unwary Lawyer*, Criminal Justice (Winter 1998); 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.”); Margaret Meriweather Cordray, *Evidence Rule 806 and the Problem of Impeaching the Nontestifying Declarant*, 56 Ohio St. L.J. 495, 504 (1997) (“where the defendant has chosen to tell his story through his own hearsay statements rather than by taking the witness stand ... it is arguably more important to allow

impeachment [by conviction] in this context, because the defendant has avoided the rigors of cross-examination by introducing his hearsay statements rather than testifying.”).

## **B. Watch Out For Counsel for Co-defendants**

Cases in which multiple defendants are tried together can also be tricky. Even though you may not introduce your client’s out-of-court statements, counsel for a co-defendant may. For example, in *U.S. v. Greenidge*, 495 F.3d 85 (3d Cir. 2007), a case involving multiple co-conspirators being tried together, the trial judge ruled before trial that one of the co-conspirator’s convictions for theft would be admissible under Rule 609 if he testified. As a result, defense counsel opted not to have that particular defendant testify. However, when another co-conspirator testified as to a conversation between the two defendants, the prosecution offered the criminal conviction of the other defendant (the non-testifying co-conspirator) for the purpose of impeaching him as a hearsay declarant under Rule 806. The Third Circuit held that this was not an abuse of discretion. Similarly, sometimes the government’s introduction of your client’s statement, may result in counsel for a co-defendant impeaching your client. In *U.S. v. Bovain*, 708 F.2d 606, 613 (11th Cir. 1983), neither Finch nor his codefendant Ricketts took the stand, but Nichols, a government witness, testified to statements made to him by Finch about Ricketts’ drug activity. Ricketts then impeached Finch’s credibility by presenting evidence of his criminal convictions: “[b]ecause Finch is a hearsay declarant, his testimony may be treated like that of a witness (Rule 806).”

## **C. Prevent Pretextual Impeachment**

May the government offer a non-testifying defendant’s admissible hearsay and then, because Federal Rule of Evidence 607 allows the impeachment of the sponsoring party’s own witness, offer impeachment of the hearsay declarant-defendant? Rule 806 would seem to permit this maneuver, but other principles of the law of impeachment would not permit such “pretext impeachment.”

So-called “pretext impeachments” are generally impermissible. That is, where the primary purpose for the Government’s calling of a witness is not to offer substantive, affirmative evidence, but rather to elicit unfavorable testimony as a pretext to impeach its (adverse) witness under Rule 607, thereby putting otherwise inadmissible evidence before the jury as impeachment, such impeachment will not be allowed.

But what if the Government does not elicit out-of-court statements made by a non-testifying defendant as a pretext for impeachment? Rather, the Government offers severely damaging testimony from the out-of-court mouth of the defendant (e.g. a confession), and then simply chooses to impeach its own witness, pursuant to the terms of Rule 607 and 806, with prior convictions. On these facts, it cannot be argued that the affirmative evidence offered by the Government was simply a pretext to impeach since the defendant’s admissible hearsay may well be the Government’s most powerful and probative evidence that would be offered in any event.

Though not exactly a pretext impeachment, this “impeachment” may be impermissible because its purpose is not the usual one. The offer of the declarant-defendant’s prior convictions is not made to discredit his credibility as a “witness” who made a confession. After all, the Government, the sponsor of the defendant’s confession, will not ask the jury to disbelieve it. Therefore, the defendant could argue that the Government's proposed Rule 806 impeachment is not designed to detract from the weight of the defendant-declarant’s testimony, the only appropriate impeachment purpose of the prior convictions. Rather, the admission of the prior convictions can serve only the purpose of inviting the jury to make the inference of propensity from bad character evidence that is forbidden by Rules 403 and 404(a).

David Sonenshein, *Impeaching the Hearsay Declarant*, 74 Temp. L. Rev. 163, 168-69 (2001) (footnotes omitted). See generally *U.S. v. Hogan*, 763 F.2d 697, 702 (5th Cir. 1985) (concluding that “[t]he prosecutor may not use a prior inconsistent statement under the guise of impeachment for the primary purpose of placing before the jury substantive evidence which is not otherwise admissible”); *U.S. v. Fay*, 668 F.2d 375, 379 (8th Cir. 1981) (“Although Rule 607 allows a party to impeach his own witness, ‘courts must be watchful that impeachment is not used as a subterfuge to place otherwise inadmissible hearsay before the jury.’”).

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

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

(d) Statements That Are Not Hearsay. A statement that meets the following conditions is not hearsay:

...

(2) An Opposing Party’s Statement. The statement is offered against an opposing party and:

- (A) was made by the party in an individual or representative capacity;
- (B) is one the party manifested that it adopted or believed to be true;
- (C) was made by a person whom the party authorized to make a statement on the subject; [or]
- (D) was made by the party’s agent or employee on a matter within the scope of that relationship and while it existed; . . .

The statement must be considered but does not by itself establish the declarant’s authority under (C); [or] the existence or scope of the relationship under (D)[.]

The typical statement by a party opponent that falls within the parameters of this rule is that made by an actual party or an agent. 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.

Note that the only requirement under this rule is that these are statements by a party opponent. The statements do not actually have to be incriminating or damaging to the party to be admissible. *See U.S. v. Reed*, 227 F.3d 763, 770 (7th Cir. 2000); *U.S. v. Thurman*, 915 F.Supp.2d 836, 849-50 (W.D. Ky. 2013).

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 statements on behalf of that party when they argue and write briefs both before and during 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 a 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 clients.

#### A. Statements 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, Kattar 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.

While finding harmless error, the *Kattar* court held, “[t]he 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.* at 131 (footnote omitted). *See also U.S. v. Salerno*, 937 F.2d 797 (2d Cir. 1991) (abuse of discretion by not allowing the defendant to introduce government’s statements in a prior prosecution against other individuals as statements by a party opponent); *U.S. v. Ganadonegrao*, 854 F. Supp. 2d 1088, 1115 (D. N.M. 2012) (prosecutor’s statements during closing argument of previous trial admissible against government in current trial).

In *U.S. v. American Tel. & Tel. 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. The court noted that the Department of Justice is merely counsel for the party and the party is the United States of America.

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

A bill of particular differs from an indictment. An indictment is a charge of the grand jury, and is not considered a government pleading; whereas, a bill of particulars is a pleading of the government. Thus, where a previous bill of particulars differs from the bill introduced at trial, the defendant may be able to admit the inconsistent bill. 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.

### **C. Statements in 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).

#### **D. Statements in Search Warrants**

In *U.S. v. Ramirez*, 894 F.2d 565, 570 (2d Cir. 1990), the court suggested 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 statement of a party opponent under Fed. R. Evid. 801(d)(2)(B).” See also *U.S. v. Morgan*, 581 F.2d 933, 937 (D.C. Cir. 1978) (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.”); *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)).

#### **E. Statements by Informants**

A government informant’s statements may be statements of the government 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 (6th Cir. 1996). But see *U.S. v. Yildiz*, 355 F.3d 80, 82 (2d Cir. 2004) (government adopts sworn statements submitted to a judicial officer, but the government does not adopt out-of-court statements, such as statements in an arrest warrant or an informant’s remarks); *U.S. v. Prevatte*, 16 F.3d 767, 779 (7th Cir. 1994) (informant’s statements were not admissions because agents of the government are supposedly disinterested in the outcome of a trial and are traditionally unable to bind the sovereign).

#### **F. Statements in Government Writings**

Sometimes something an agent or expert working for the government writes is a statement by a party opponent. 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.

Similarly, in *Langbord v. U.S. Dept. of Treasury*, 2011 WL 2623315 (E.D. Pa. 2011) (not reported in F. Supp. 2d), the government had initiated a forfeiture action against ten 1933 Double Eagles gold pieces. The government was arguing that the Double Eagles were embezzled or stolen from the United States Mint and had been wrongfully retained by someone with knowledge that they were embezzled or stolen. The Langbords wanted to introduce a page printed from the Mint’s website in 2007 that listed the 1933 Double Eagle among “Circulating Coins.” The Langbords asserted that this “admission” by the government weakened the government’s argument that the Mint never lawfully issued 1933 Double Eagles. The court held that “the statement potentially qualifies as an admission such that the hearsay rule does not bar its admission pursuant to Rule 801(d)(2)(A).” *Id.* at \*14. In addition, the Langbords wanted to introduce three exhibits that they contended tended to show the incompleteness of government records. Two were printouts from the National Archives website, and the third consisted of two photographs of a correspondence log from which several pages have been removed. The court concluded that “[a]ll three documents make it slightly more probable that the records the Government relies upon are not complete, thereby bolstering the Langbords’ contention that such records could not lead to a conclusive opinion as to whether the Gold Pieces left the Mint through authorized channels.” *Id.* The court concluded that the exhibits were “non-hearsay under Rule 801(d)(2)(D), which provides that a statement is not hearsay if offered against a party ‘by his agent or servant concerning a matter within the scope of his agency or employment, (and is) made during the existence of the relationship.’” *Id.* The court noted in a footnote that “[b]ecause the United States represents the interest of the people in this action, the Court considers any agency of the Executive Branch an agent of the United States under Rule 801(d)(2) (D).” *Id.* at n.11.

In *English v. District of Columbia*, 651 F.3d 1 (D.C. Cir. 2011), a § 1983 action for excessive force against the District of Columbia government and a detective of the Metropolitan Police Department, the plaintiff sought to admit portions of the Force Investigation Team Report (“FIT Report”) prepared by the MPD’s Affairs Bureau Force Investigations Branch and a letter written by Inspector Porter recommending termination of the detective’s employment. The court held that they were admissible, explaining:

First, . . . the FIT Report and Inspector Porter’s letter are non-hearsay party admissions under Federal Rule of Evidence 801(d)(2)(D). It is undisputed that Sergeant Gutherie and Inspector Porter were acting within the scope of their employment by the District of Columbia government, one of the defendants in this case—at the time they prepared and submitted them. The government responds, without citation to authority, that the documents are not party admissions because the District government did not “adopt or ratify” them and the findings were not “final.” Appellees’ Br. 23. The plain text of Rule 801(d)(2)(D) requires neither adoption nor ratification but only that the statement is offered “against a party,” Fed.R.Evid. 801(d)(2), and it is “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,” Fed.R.Evid. 801(d)(2)(D); see *Talavera v. Shah*, 638 F.3d 303, 309–10 (D.C. Cir. 2011). Consequently, the FIT Report and the letter recommending termination of

employment are District government admissions that were admissible at trial against it and Detective McConnell in his official capacity. . .

*Id.* at 7 (footnote omitted).

Not every writing produced by a government employee, however, is a statement of the government. *See, e.g., U.S. v. Graza*, 448 F.3d 294, 299 (5th Cir. 2006) (report written by DOJ investigator regarding credibility of officer not admissible as government admission).

As these examples should make 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>12</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 statements you can use on appeal.

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

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.

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<sup>12</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.

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 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.<sup>13</sup>

If the court rules that application of judicial estoppel is inappropriate, the prior inconsistent statement may still be used as a statement by a party opponent, 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

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<sup>13</sup> 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) (where, during trial and on appeal, government argued that defendant's connection with searched house was sufficient to establish his constructive possession of cocaine found there, government could not be heard, two years after trial, to seek to return case to district court for re-examination of this factual issue); *U.S. v. Issacs*, 708 F.2d 1365, 1367-68 (9th Cir. 1983) (government may not argue that defendant was in possession of incriminating evidence but deny that there was any expectation of privacy where the circumstances of the case make the positions necessarily inconsistent); cf. *U.S. v. Erickson*, 732 F.2d 788, 792 (10th Cir. 1984).

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 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>14</sup>

#### 4. 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 (10th Cir. 2005) (holding comments made by defense counsel during sentencing can constitute admissions); *U.S. v. Amato*, 356 F.3d 216 (2d 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.

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 statement 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. <sup>9</sup> *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 statement 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

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<sup>14</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.

the prosecutor's request, the trial judge admitted the defense attorney's statement from the opening in the previous trial as a statement 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 the cross-examination of this witness 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 statement is still subject to the trial court's Rule 403 balancing.

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

### A. Overview and Timing

Fed. R. Evid. 106 provides:

If a party introduces all or part of a writing or recorded statement, an adverse party may require the introduction, at that time, of any other part — or any other writing or recorded statement — that in fairness ought to be considered at the same time.

Fed. R. Evid. 106 is an underused rule that can have significant implications for the criminal defense practitioner.<sup>15</sup> The key words in the rule are “*at that time.*” Rule 106 ensures that a misleading impression created by taking matters out of context is corrected immediately. *U.S. v. Holden*, 557 F.3d 698, 705 (6<sup>th</sup> Cir. 2009).<sup>16</sup> Thus, 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 government's examination be it direct, cross or re-direct. You want the jury to know immediately that the prosecution has tried to mislead them. Interrupting the prosecution's presentation of evidence to insert your evidence is thus generally far more persuasive than waiting until your next opportunity to examine the witness.

Some circuits strictly construe the wording of the rule and require that you offer the

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<sup>15</sup> For a discussion of Rule 106 including state law, see Bergman and Hollander, *Wharton's Criminal Evidence* § 4:10 (15th ed.).

*See also* Requirement, under Rule 106 of Federal Rules of Evidence, that when writing or recorded statement or part thereof is introduced in evidence, another part or another writing or recorded statement must also be introduced in evidence, 75 A.L.R. Fed. 892.

<sup>16</sup> *See U.S. v. Boylan*, 898 F.2d 230, 256 (1st Cir. 1990) (Rule 106 “protects litigants from the twin pitfalls of creative excerpting and manipulative timing.”); *see also U.S. v. Burns*, 162 F.3d 840, 852-53 (5th Cir. 1998) (under the “rule of completeness,” “the opponent, against whom part of an utterance has been put in, may in his turn complement it by putting in the remainder in order to secure for the tribunal a complete understanding of the total tenor and effect of the utterance”); *U.S. v. Oseby*, 148 F.3d 1016, 1025 (8th Cir. 1998) (“The advisory committee notes to Rule 106 state that one of the considerations for this rule is to avoid ‘the misleading impression created by taking matters out of context.’”); *U.S. v. Harry*, 2013 WL 3270986, \*6 (D.N.M. Jun. 3, 2013) (unpublished opinion) (“By allowing the other party to present the remainder of the writing or recorded statement immediately rather than later on cross-examination, this rule avoids the situation where a statement taken out of context ‘creates such prejudice that it is impossible to repair by a subsequent presentation of additional material.’”) (internal citation omitted).

evidence immediately if you want to rely upon Rule 106. See, e.g., *U.S. v. Larranaga*, 787 F.2d 489, 500 (10th Cir. 1986) (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 [was] misplaced.”<sup>17</sup> That does not mean, however, that you cannot introduce such evidence later as long as it is admissible under other rules of evidence.<sup>18</sup> Other circuits have not been as stringent about requiring Rule 106 evidence to be introduced during the other side’s examination. See, e.g., *Phoenix Associates III v. Stone*, 60 F.3d 95 (2d Cir. 1995) (defendant introduced financial documents pursuant to Rule 106 but waited to do so until his direct examination of a witness).<sup>19</sup> Check the case law in your circuit if you prefer to wait until later.

Finally, always remember the trial judge enjoys great discretion. As with most rulings on evidence, it is best to win at the trial level because the standard of review on appeal is an abuse of discretion.<sup>20</sup> *U.S. v. Walker*, 652 F.2d 708, 710 (7th Cir. 1981), is one of those rare cases where the defendant used Rule 106 successfully on appeal. Walker was a fire fighter accused of extortion. His first trial ended with a hung jury. He 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 was reversible error under Rule 106, stating:

In criminal cases where the defendant elects not to testify, as in the present case, more is at stake than the order of proof. If the Government is not required to submit all relevant portions of prior testimony which further explain selected parts which the Government has offered, the excluded portions may never be admitted. Thus there may be no “repair work” which could remedy the unfairness of a selective presentation later in the trial of such a case.

*Id.* at 713.

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<sup>17</sup> See also *Jamison v. Collins*, 291 F.3d 380, 387 (6th Cir. 2002) (“[U]nder Rule 106, the party seeking to have a document introduced for the sake of completeness must request that the new document be introduced at the time of introduction of the allegedly incomplete document.”).

<sup>18</sup> See generally Michael A. Hardin, *This Space Intentionally Left Blank: What to Do When Hearsay and Rule 106 Completeness Collide*, 82 Fordham L. Rev. 1283 (2013).

<sup>19</sup> See also *U.S. v. Holden*, 557 F.3d 698, 705-06 (6th Cir. 2009) (“Whether a party waives their right of completeness under these circumstances is an open question in this circuit, but we now reject the waiver rule adopted by the district court. As the advisory committee’s note to Rule 106 makes clear, the rule does not restrict admission of completeness evidence to the time the misleading evidence is introduced . . .”); *U.S. v. Rubin*, 609 F.2d 51, 63 (2d Cir. 1979) (upholding admission of notes under Rule 106 even though government waited until its redirect examination of witness to introduce them).

<sup>20</sup> See *U.S. v. Webber*, 255 F.3d 523, 526 (8<sup>th</sup> Cir. 2001); *U.S. v. Llera-Morales*, 759 F.3d 1105, 1111 (9<sup>th</sup> Cir. 2014).

## B. Oral statements

Fed. R. Evid. 106 generally does not apply to an oral statement unless it has been recorded.<sup>21</sup> Even if Rule 106 might not fit precisely, some courts have admitted oral statements pursuant to Fed. R. Evid. 611(a), which gives the trial court broad discretion to control the mode and order of interrogating witnesses.<sup>22</sup>

In *U.S. v. Castro*, 813 F.2d 571, 576 (2d Cir. 1987), the court noted that while Rule 106 does not apply to the spoken word (unless recorded),

whether we operate under Rule 106's embodiment of the rule of completeness, or under the more general provision of Rule 611(a), 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."

Thus, if a Rule 106 argument is not successful when you are trying to admit an oral statement, try Rule 611(a).<sup>23</sup>

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<sup>21</sup> See, e.g., *U.S. v. Verdugo*, 617 F.3d 565, 579 (1st Cir. 2010) ("Rule 106 does not apply to testimony about unrecorded oral statements"); *U.S. v. Kivanc*, 714 F.3d 782, 793 (4th Cir. 2013) ("Rule 106 applies only to writings and recorded statements, not to conversations."); *U.S. v. Hayat*, 710 F.3d 875, 896 (9th Cir. 2013) ("our cases have applied the rule of completeness only to written and recorded statements") (internal quotation and citation omitted).

<sup>22</sup> See, e.g., *U.S. v. Johnson*, 507 F.3d 793, 796 n. 2 (2d Cir. 2007) ("[Rule 106] is stated as to writings, but we have said that Federal Rule of Evidence 611(a) renders it 'substantially applicable to oral testimony, as well.' United States v. Mussaleen, 35 F.3d 692, 695 (2d Cir. 1994) (internal quotation marks omitted)"); *U.S. v. Holden*, 557 F.3d 698, 705 (6th Cir. 2009) ("The common law version of the rule was codified for written statements in Fed. R. Evid. 106, and has since been extended to oral statements through interpretation of Fed.R.Evid. 611(a). Courts treat the two as equivalent." (footnotes omitted)); *U.S. v. Reese*, 666 F.3d 1007, 1019 (7th Cir. 2012) (Although the court states: "Rule 106 also applies to oral, nonrecorded statements"; it cites to cases that relied upon Rule 611(a) as the basis for admitting the statements); *U.S. v. Li*, 55 F.3d 325, 329 (7th 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. Lopez-Medina*, 596 F.3d 716, 734 (10th Cir. 2010) ("While Rule 106 applies only to writings and recorded statements, we have held the rule of completeness embodied in Rule 106 is substantially applicable to oral testimony, as well by virtue of Fed. R. Evid. 611(a), which obligates the court to make the interrogation and presentation effective for the ascertainment of the truth.") (internal quotations and citations omitted); *U.S. v. Baker*, 432 F.3d 1189, 1223 (11th 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.") (internal citations and quotations omitted). For further discussion of Rule 611(a), see Bergman and Hollander, *Wharton's Criminal Evidence* §§8:11 to 8:12 (15th ed.).

<sup>23</sup> Fed. R. Evid. 611(a) provides:

- (a) Control by the Court; Purposes. The court should exercise reasonable control over the mode and order of examining witnesses and presenting evidence so as to:
- (1) make those procedures effective for determining the truth;
  - (2) avoid wasting time; and
  - (3) protect witnesses from harassment or undue embarrassment.

### C. Fairness Test

Rule 106 applies to a portion of a document or recording “that in fairness ought to be considered at the same time.” To offer evidence under Rule 106, you must establish both that the evidence is (1) relevant to the issues in the case and (2) it clarifies or explains the portion offered by the government. *U.S. v. Glover*, 101 F.3d 1183, 1190 (7th Cir. 1996), *rev'd on other grounds*, 531 U.S. 198 (2001).<sup>24</sup> See *Beech Aircraft Corp. v. Rainey*, 488 U.S. 153, 172 (1988) (“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 Rule 401 and 402.”) (emphasis added).<sup>25</sup>

The district courts look at factors to determine if there is a clarifying purpose:

- (1) does the evidence explain the admitted evidence,
- (2) does it place the admitted evidence in context,
- (3) will admitting it avoid misleading the trier of fact, and
- (4) will admitting it insure a fair and impartial understanding of all of the evidence.

*U.S. v. Velasco*, 953 F.2d 1467, 1475 (7th Cir. 1992). Most circuits have applied similar tests.<sup>26</sup>

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. Courts are not required to admit entire documents or recordings to

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<sup>24</sup> See also *U.S. v. Pendas-Martinez*, 845 F.2d 938, 944 (11th Cir. 1988) (additional material must be relevant and necessary “to qualify, explain, or place into context the portion already introduced”).

<sup>25</sup> Although *Beech Aircraft* was a civil case and skirted the Rule 106 issue, many criminal cases that deal with Rule 106 refer to it.

<sup>26</sup> See, e.g., *U.S. v. Branch*, 91 F.3d 699, 728 (5th Cir. 1996) (“Although different circuits have elaborated Rule 106’s ‘fairness’ standard in different ways, . . . common to all is the requirement that the omitted portion be relevant and ‘necessary to qualify, explain, or place into context the portion already introduced.’”) (citing *U.S. v. Pendas-Martinez*, 845 F.2d 938, 944 (11th Cir. 1988)).

One variation between the circuits is whether this test is in the conjunctive or disjunctive. Compare *U.S. v. Glover*, 101 F.3d 1183, 1190 (7th Cir. 1996) (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) with *U.S. v. Soures*, 736 F.2d 87, 91 (3d Cir. 1984) (same rule but disjunctive, requiring “or” and not “and”); *U.S. v. Marin*, 669 F.2d 73, 84–85 (2d Cir. 1982) (same).

The Seventh Circuit cases are not even consistent internally as to whether the test is conjunctive or disjunctive. See, e.g., *U.S. v. Sweiss*, 814 F.2d 1208, 1211-12 (7th Cir. 1987) (disjunctive) and *U.S. v. Glover*, 101 F.3d 1183, 1190 (7th Cir. 1996) (conjunctive). To add to the confusion, the *Glover* opinion cites *U.S. v. Velasco*, 953 F.2d 1467, 1475 (7th Cir. 1992), which in turn relies on *Sweiss* where the court clearly lists the factors in the disjunctive, although the same court held that the test for admission was conjunctive.

satisfy the rule of completeness -- “only those portions which are ‘relevant to an issue in the case’ and necessary ‘to clarify or explain the portion already received’ need to be admitted.” *U.S. v. Lopez–Medina*, 596 F.3d 716, 735 (10th Cir. 2010).<sup>27</sup>

Deciding what constitutes “complete” can be a difficult question. The First Circuit noted:

[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 class, some subpart of a document or collection. We believe that the only sound approach is to accord the district court, within its usual evidentiary discretion, the task of determining what reasonable unit of wholeness must be preserved in order to comply with Rule 106’s mandate of completeness.

*U.S. v. Boylan*, 898 F.2d 230, 256-57 (1st Cir. 1990) (citations omitted).<sup>28</sup> Thus, statements admissible under Rule 106 need not have been made at the same time<sup>29</sup> although they often are.<sup>30</sup> In *U.S. v. Castro–Cabrera*, 534 F. Supp. 2d 1156, 1160 (C.D. Cal. 2008), the district court provided guidance on when an inextricably intertwined statement should be admitted in its entirety to rebut a misleading impression:

The Rule of Completeness warrants admission of statements in

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<sup>27</sup> See, e.g., *U.S. v. Glover*, 101 F.3d 1183 (7th 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); *U.S. v. Haddad*, 10 F.3d 1252, 1259 (7th Cir. 1993) (“The marijuana that Mr. Haddad admitted placing under the bed was only some six inches from the implicated gun. The defendant in effect said “Yes, I knew of the marijuana but I had no knowledge of the gun.” The admission of the inculpatory portion only (i.e. that he knew of the location of the marijuana) might suggest, absent more, that the defendant also knew of the gun. The whole statement should be admitted in the interest of completeness and context, to avoid misleading inferences, and to help insure a fair and impartial understanding of the evidence. The error in the evidentiary ruling was, nevertheless, harmless.”).

<sup>28</sup> See, e.g., *Flores v. Cameron County*, 92 F.3d 258, 273 n.12 (5th Cir. 1996) (detention center logbook showing that juvenile detainee suffered bleeding rectum during previous incarceration in the detention center and suggested that injury possibly resulted from sexual abuse was admissible, under Rule 106, in civil rights action based on alleged use of excessive force against the detainee, where county, with warning of the court’s ruling, offered into evidence all other logbooks covering the juvenile’s stays at the detention center); see also *U.S. v. Millan*, 230 F.3d 431, 435 (1st Cir. 2000) (applying a “reasonable unit of wholeness” standard when evaluating completeness).

<sup>29</sup> See, e.g., *U.S. v. Sutton*, 801 F.2d 1346, 1369-71 (D.C. Cir. 1986) (holding that portions of transcripts of recorded conversations from different days were admissible under Rule 106).

<sup>30</sup> See, e.g., *U.S. v. Cosgrove*, 637 F.3d 646, 661 (6th Cir. 2011) (defendant not allowed to offer text messages under Rule 106 that had been sent several weeks before the text message that the government had introduced; court found the earlier messages were too far removed in time to be contextually related).

their entirety when the Government introduces only a portion of inextricably intertwined statements.

Statements are inextricably intertwined when the meaning of a statement, if divorced from the context provided by the other statement, is different than the meaning the statement has when read within the context provided by the other statement. Under those circumstances, a court must take care to avoid distortion or misrepresentation of the speaker's meaning, by requiring that the statements be admitted in their entirety and allowing the jury to determine their meaning.

534 F. Supp. 2d at 1160 (citation omitted).

Specifically identify what portions of a document or recording you want admitted and why those parts are necessary to avoid distorting or misrepresenting the meaning of what the government has introduced. *See, e.g., U.S. v. Littwin*, 338 F.2d 141, 146 (6th Cir. 1964) (statements excluded when defense counsel did not point out “what word, remark or phrase in that part of the tape which was played he would like to have explained or rebutted, or what part of the unplayed tape would be relevant or would throw light upon any word, phrase or remark which the jury had heard.”).

#### **D. What If Evidence Offered Under Rule 106 Is Otherwise Inadmissible?**

Some courts consider Fed. R. Evid. 106 a rule that only changes the normal order of proof but does not make otherwise inadmissible evidence admissible.<sup>31</sup> This comes up most often when the government introduces a portion of a defendant’s statement as a statement by a party opponent. When the defense then seeks to offer other exculpatory portions of the statement, the government argues that those portions are inadmissible hearsay.

Other courts permit otherwise inadmissible evidence to come in under Rule 106.<sup>32</sup>

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<sup>31</sup> *See, e.g., U.S. v. Lentz*, 524 F.3d 501, 526 (4th Cir. 2008) (“Rule 106 does not, however, “render admissible the evidence which is otherwise inadmissible under the hearsay rules.” [*U.S. v. Wilkerson*, 84 F.3d [692,] 696 (4th Cir. 1996)]. Nor does it require the admission of “self-serving, exculpatory statements made by a party which are being sought for admission by that same party.” *Id.*); *U.S. v. Costner*, 684 F.2d 370, 373 (6th Cir. 1982) (Rule 106 “covers an order of proof problem; it is not designed to make something admissible that should be excluded”; reversing defendant’s conviction when district court relied on Rule 106 to admit inadmissible hearsay and Fed. R. Evid. 404(a) evidence against the defendant); *but see U.S. v. Adams*, 722 F.3d 788, 826 n.31 (6th Cir. 2013) (concluding that while it was bound by the *Costner* decision, the panel encouraged the Sixth Circuit, if it chose to sit en banc, to consider whether that approach should be rejected).

<sup>32</sup> *See, e.g., U.S. v. Bucci*, 525 F.3d 116, 133 (1<sup>st</sup> Cir. 2008) (“our case law unambiguously establishes that the rule of completeness may be invoked to facilitate the introduction of otherwise inadmissible evidence”); *U.S. v. Millard*, 139 F.3d 1200 (8th Cir. 1998) (if proponent introduces inadmissible evidence, the court may permit opponent to rebut evidence by introducing similarly inadmissible evidence to neutralize or cure any prejudice); *U.S. v. Coughlin*, 821 F. Supp. 2d 8, 30 (D.D.C. 2011) (“Coughlin is correct, however, that regardless of whether this evidence is inadmissible hearsay or not, he can introduce it under the rule of completeness.”); *U.S. v. Peeples*, 2003 WL 57030, at \*3 (N.D. Ill. Jan. 7, 2003) (unpublished opinion) (although not admissible as statements against interest under Fed. R. Evid. 803(b)(3), the defendant’s exculpatory statements to the police would be admissible under Rule 106’s rule of completeness because they “will place the statements offered by the prosecution in perspective and diminish the possibility that a juror hearing only that portion of the statement

First, the rule contains no proviso, as is found in every major rule of exclusion in the evidence 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.<sup>33</sup> Finally, on grounds of fairness, the government should not be permitted to misrepresent or distort the meaning of evidence it introduces.<sup>34</sup>

To address the fairness issue, some courts have given the government a choice: either (1) the otherwise inadmissible evidence will be admitted or (2) the government can choose not to introduce the evidence that was being taken out of context. See *U.S. v. LeFevour*, 798 F.2d 977, 981 (7th Cir. 1986).<sup>35</sup> Similarly, in *U.S. v. Castro-Cabrera*, 534 F. Supp. 2d 1156 (C.D. Cal. 2008), the court ruled that a defendant's statement to immigration officers was an admission but the government wished to introduce only part of the statement. The rest, if offered by the defendant, would be inadmissible hearsay. The court ruled, however, that the entire statement would have to be admitted or none at all to avoid distorting the meaning of the statement.

### E. Codefendants and Bruton issues

The interplay between Rule 106 and *Bruton v. U.S.*, 391 U.S. 123, 126 (1968), may present special problems. Under *Bruton*, your client's “right to cross-examination secured by the Confrontation Clause of the Sixth Amendment” is violated if the jury is presented with a nontestifying co-defendant's confession that also implicates your client but which is not admissible against your client.

The Rule 106/*Bruton* issue arises if the prosecution seeks to introduce only a portion of a non-testifying defendant's statement that is admissible only against that defendant, who then argues that, under Rule 106, additional portions of the statement should be introduced and those additional portions inculcate your client. If the court concludes that the additional portions are admissible under Rule 106 and they cannot be effectively redacted to omit any reference to your client without distorting the meaning of the statement, then no part of the first defendant's statement should be admitted or the court should grant the defendants

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being offered by the prosecution will conclude that the defendant failed to deny turning and aiming his gun at the special agent.”).

<sup>33</sup> See generally Wright and Miller, *Federal Practice and Procedure*, Evidence § 5078.

<sup>34</sup> Many commentators have recommended that Rule 106 should apply to otherwise inadmissible evidence. See, e.g., Dale A. Nance, *A Theory of Verbal Completeness*, 80 IOWA L. REV. 825 (1995); Stephen A. Saltzburg et al., 1-106 FEDERAL RULES OF EVIDENCE MANUAL § 106; Charles Alan Wright et al., 21A FEDERAL PRACTICE AND PROCEDURE § 5078.1 (2d ed. 2012). See also *U.S. v. Sutton*, 801 F.2d 1346, 1367 (D.C. Cir. 1986) (although the trial court should have admitted portions of the taped conversation that were otherwise inadmissible, the error was harmless).

<sup>35</sup> See also *U.S. v. Millan*, 230 F.3d 431, 434 (1st Cir. 2000) (“a party wishing to introduce only a portion of a recorded statement may be precluded from doing so where partial disclosure out of context would result in unfairness to the other party.” (footnote omitted)).

separate trials.<sup>36</sup> See *U.S. v. Smith*, 794 F.2d 1333, 1335 (8th Cir. 1986) (finding rule of completeness inapplicable because the excluded portions were neither explanatory nor relevant to the introduced statements).

#### **F. Using Rule 106 -- Tactics**

In some circumstances, you may choose not to object to the prosecutor's attempt to admit an exhibit as long as you can use Rule 106 to get your evidence admitted. Following is an example of how this might work:

Prosecutor: Your honor, I move the admission of government's exhibit number 1, which is the recording of defendant's July 1 conversation with Agent Jones.

Court: Any objection from the defendant?

Defense Counsel: Your honor, the defendant will not object to the admission of this evidence so long as the court also admits defendant's exhibit A, the recording of defendant's June 28 conversation with Agent Jones, pursuant to Fed. R. Evid. 106, because, in fairness, the jury should consider it contemporaneously with government's exhibit 1. Defendant's exhibit A meets the qualifications of Rule 106 because it is directly relevant to the charge that defendant solicited illegal drugs from Agent Jones. Furthermore: (1) it explains the conversation recorded in government's exhibit 1; (2) it places the later conversation in the appropriate context by relating to the prior conversation; (3) without having the earlier conversation also available to the jury the jury would be unfairly and prejudicially misled; and (4) the earlier conversation is vital to a fair and impartial understanding of the conversation recorded on July 1.

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

Remember, Fed. R. Evid. 106 works both ways; the government can introduce documents or portions of documents during your case as well.<sup>37</sup> You do not want to damage your credibility in front of the jury by taking evidence out of context or presenting it in a way that distorts its meaning or misrepresents what was said.

If this happens, you may find yourself making the arguments that we have suggested

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<sup>36</sup> See, e.g., *U.S. v. Burns*, 162 F.3d 840, 853 (5<sup>th</sup> Cir. 1998) (When Rule 106 conflicts with *Bruton*, the decision to admit which is in the court's discretion "must be based on whether the admission of the edited statement would distort the meaning of the original in a way that gives rise to 'a serious risk that a joint trial would compromise a specific trial right of one of the defendants, or prevent the jury from making a reliable judgment about guilt or innocence.'").

<sup>37</sup> See, e.g., *U.S. v. Gravely*, 840 F.2d 1156, 1163 (4<sup>th</sup> Cir. 1988) (court properly permitted government to cross-designate portions of grand jury testimony when defendant introduced portions of testimony at trial).

the prosecution may use to keep you from introducing evidence under Rule 106.<sup>38</sup> For example, argue that the document is not otherwise admissible.<sup>39</sup> If possible, argue that introduction would circumvent the prohibitions contained in the Confrontation Clause.<sup>40</sup> Hinge your arguments on the “fairness” words in the rule. You can also try to limit the use of Rule 106 against your client by arguing that if the original document was introduced only for impeachment, the Rule 106 evidence should also be limited to impeachment.<sup>41</sup> 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.<sup>42</sup>

## 6. USE THAT LIE

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

(b) Specific Instances of Conduct. Except for a criminal conviction under Rule 609, extrinsic evidence is not admissible to prove specific instances of a witness's conduct in order to attack or support the witness's character for truthfulness. But the court may, on cross-examination, allow them to

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<sup>38</sup> Don't make arguments that are inconsistent with positions you have taken earlier unless you lost those arguments or can distinguish them.

<sup>39</sup> See, e.g., *U.S. v. Sine*, 493 F.3d 1021, 1038 (9th Cir. 2007) (“Presenting a theory of the case that can be effectively rebutted by otherwise-inadmissible evidence, however, does not by itself open the door to using such evidence; only partial, misleading use of the evidence itself can do so.”); *U.S. v. Collicott*, 92 F.3d 973, 983 (9th Cir. 1996) (conviction reversed because, after defendant introduced prior inconsistent statement of informant, trial court permitted government to question agent about other inadmissible hearsay statements informant made); *U.S. v. Brown*, 921 F.2d 1304, 1307-08 (D.C. Cir. 1990) (“Although the government may prevent a defendant from using rules of evidence to select and enter pieces of evidence wholly out of context, the government may not shore up a prosecution by pushing through the open door evidence not necessary to remove any unfair prejudice created by defense counsel's tactics.” (internal quotation marks omitted)).

<sup>40</sup> See Bergman & Hollander, *The Everytrial Criminal Defense Book*, §§35:1 to 35:11 for further discussion of Hearsay/Confrontation Clause issues.

<sup>41</sup> See, e.g., *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.”).

<sup>42</sup> See, e.g., *U.S. v. Moussaoui*, 382 F.3d 453, 482 (4th 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.”); *U.S. v. Ramos-Caraballo*, 375 F.3d 797, 803 (8th 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.’ ”).

be inquired into if they are probative of the character for truthfulness or untruthfulness of:

- (1) the witness; or
- (2) another witness whose character the witness being cross-examined has testified about.

By testifying on another matter, a witness does not waive any privilege against self-incrimination for testimony that relates only to the witness's character for truthfulness.

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>43</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.<sup>44</sup> 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?

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<sup>43</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>44</sup> It is important to remember that the extrinsic evidence prohibition of Rule 608(b) bars any reference to the *consequences* that a witness might have faced as a result of an alleged bad act. For example, Rule 608(b) does not permit counsel to mention that a witness was suspended or disciplined for the conduct that is the subject of impeachment, when that conduct is offered only to prove the character of the witness. *See U.S. v. Davis*, 183 F.3d 231, 257 n. 12 (3d Cir. 1999) (emphasizing that in attacking the defendant's character for truthfulness "the government cannot make reference to Davis's forty-four day suspension or that Internal Affairs found that he lied about" an incident because "[s]uch evidence would not only be hearsay to the extent it contains assertion of fact, it would be inadmissible extrinsic evidence under Rule 608(b)").

- 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>45</sup>

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>46</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.

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<sup>45</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).

<sup>46</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.

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>47</sup> Keep in mind that if you spend time discussing it with opposing counsel and the court in front of the jury, and 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

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<sup>47</sup> Fed. R. Evid. 612 provides:

(a) Scope. This rule gives an adverse party certain options when a witness uses a writing to refresh memory:

(1) while testifying; or

(2) before testifying, if the court decides that justice requires the party to have those options.

(b) Adverse Party’s Options; Deleting Unrelated Matter. Unless 18 U.S.C. § 3500 provides otherwise in a criminal case, an adverse party is entitled to have the writing produced at the hearing, to inspect it, to cross-examine the witness about it, and to introduce in evidence any portion that relates to the witness’s testimony. If the producing party claims that the writing includes unrelated matter, the court must examine the writing in camera, delete any unrelated portion, and order that the rest be delivered to the adverse party. Any portion deleted over objection must be preserved for the record.

(c) Failure to Produce or Deliver the Writing. If a writing is not produced or is not delivered as ordered, the court may issue any appropriate order. But if the prosecution does not comply in a criminal case, the court must strike the witness’s testimony or — if justice so requires — declare a mistrial.

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 “if the prosecution does not to comply,” the court “must” strike the witness’s testimony, or “if justice so requires -- 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 their 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>48</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 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).<sup>49</sup> What do you do if the expert refuses to admit that the

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<sup>48</sup> Fed. R. Evid. 105 states:

If the court admits evidence that is admissible against a party or for a purpose — but not against another party or for another purpose — the court, on timely request, must restrict the evidence to its proper scope and instruct the jury accordingly.

<sup>49</sup> Fed. R. Evid. 803(18) provides:

The following are not excluded by the rule against hearsay, regardless of whether the declarant is available as a witness:

...

(18) Statements in Learned Treatises, Periodicals, or Pamphlets. A statement contained in a treatise, periodical, or pamphlet if:

(A) the statement is called to the attention of an expert witness on cross-examination or relied on by the expert on direct examination; and

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 then 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. We typically think of doing this when challenging the admissibility of the government's own expert witness. But it can also be used even more creatively. In another 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).<sup>50</sup> Object and advise

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(B) the publication is established as a reliable authority by the expert's admission or testimony, by another expert's testimony, or by judicial notice.

If admitted, the statement may be read into evidence but not received as an exhibit.

<sup>50</sup> Fed. R. Evid. 803(6) provides:

The following are not excluded by the rule against hearsay, regardless of whether the declarant is available as a witness:

...

(6) Records of a Regularly Conducted Activity. A record of an act, event, condition, opinion, or diagnosis if:

(A) the record was made at or near the time by — or from information transmitted by — someone with knowledge;

(B) the record was kept in the course of a regularly conducted activity of a business, organization, occupation, or calling, whether or not for profit;

(C) making the record was a regular practice of that activity;

(D) all these conditions are shown by the testimony of the custodian or another qualified witness, or by a certification that complies with Rule 902(11) or (12) or with a statute permitting certification; and

(E) the opponent does not show that the source of information or the method or

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.

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circumstances of preparation indicate a lack of trustworthiness.