

OFFENSIVE USE OF THE **RULES OF EVIDENCE**

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Revised September, 2010

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I. OVERVIEW - THE PROSECUTORIAL DEFENDER

As defense attorneys, we are quick to remind juries that our side does not have to prove anything and to slip in the old adage that you cannot prove a negative. This presentation will explore various rules available for you to “prosecute your case.” I use the verb “prosecute” because there are a number of evidentiary rules that we traditionally link to the prosecution, even though the rules are available to both sides.

Also, many of us were trained in the philosophy of “less is more.” We spend most of our pretrial efforts trying to exclude evidence, and comparatively little on creative ways to admit evidence favorable to the defense. Sometimes, we need to step back and think of ourselves as the “prosecutors” of our client’s story, or, when appropriate, prosecutors of the other guy who did it. Of course, this does not mean that you can only employ these tactics during your case-in-chief. In fact, you may find that you are able to get your client’s case presented through effective cross-examination, and never put on a case at all. It is simply a way of taking a fresh look at old rules – some which we have despised as hated enemies.

II. DEVELOPING YOUR THEORY OF THE CASE

It may seem obvious to many of you, but everything has to start with the development of a sound theory of the case. Tony Natale, a regular presenter on this topic, defines *theory of the case* as :

That combination of facts (beyond dispute) and law which in a common sense and emotional way, leads the jury/judge to conclude that a fellow person is wrongfully accused.

See Training Materials at www.fd.org for Trial Skills Academy, April, 2010 . Natale emphasizes that this is not a “theory of defense,” since the latter would “convey an attitude that there are two sides or version”

It is important for us to remember that communicating the theory of the case depends on your ability to do it in an “emotional way.” Keep this in mind in cases where an acquittal depends on negating the element of intent. When the jury is deciding whether your client *must have known* the drugs were in the car, or that he *had to believe* that he was part of a conspiracy, the emotional circumstances can prove to be substantial, and your ability to illustrate this may depend on how you articulate this part of the theory of the case.

When your investigation reveals a pearl, perhaps some dirt on a government witness, it is tempting for even an experienced litigator to put the cart before the horse.

You decide how to get the evidence admitted before you decide on your theory of the case. For example, you learn before trial that an officer who is scheduled to testify just became the subject of an internal affairs investigation in another case. You spend hours preparing a scathing cross-examination that will attack this officer's credibility. When you get around to developing your theory of the case, you realize that the officer actually says things in his report that advance your theory. You have wasted valuable time trying to impeach the credibility of a witness when, in fact, you may want to see if you can use the instigation of the internal affairs investigation to show that the officer is being disciplined for telling the truth. The officer may be an unwilling ally in this endeavor.

The overriding concept here is to promote purposeful communication. When you communicate information to the jury, it should further your theory of the case. Trial is not the time to fly on "auto-pilot." If you do not have a theory of the case, you run the risk of taking the jury somewhere that you do not want them to go. That may happen regardless, but you should not be the driving force. After you develop a theory of the case, you can effectively develop your "theory of admission" with respect to all of the evidence you seek to introduce.

III. DEVELOPING THEORIES OF ADMISSION

a. The Constitutional Rules of Evidence

Whenever possible, you should be prepared to link any theory of admission with an argument that relates to your client's constitutional rights. Once again, it is critical to have a theory of the case so you can argue how the exclusion of this evidence could impinge on your client's right to present a defense under the Sixth Amendment. See *Faretta v. California*, 422 U.S. 806, 818, 95 S.Ct. 2525 (1975)(holding that the Sixth Amendment guarantees "the calling and interrogation of favorable witnesses, the cross-examination of adverse witnesses, and the ordinary introduction of evidence"); *Davis v. Alaska*, 415 U.S. 308, 315, 94 S.Ct. 1105 (1974)(holding that the Sixth Amendment allows the defense to cross-examine a Government witness to test the witness' perceptions and memory, to impeach or discredit the witness, and to prove ulterior motives of the witness); *Washington v. Texas*, 388 U.S. 14, 19, 87 S.Ct. 1920 (1967)(holding that the Sixth Amendment affords the defense "the right to present the defendant's version of the facts ... to the jury so it may decide where the truth lies"); *Crawford v. Washington*, 541 U.S. 36, 51-52, 124 S.Ct. 1354 (2004)(holding that the Confrontation Clause "applies to 'witnesses' against the accused - in other words, those who "bear testimony'" and that "[s]tatements taken by a police officer in the course of interrogations are also

testimonial” for Confrontation Clause purposes). Also, you can argue the Fifth Amendment right to due process.

While these arguments may not impress the trial judge, you have to be mindful of the record. This could be critical for appellate review. Remember errors regarding the Rules of Evidence are generally considered to be procedural. Procedural errors are not considered to be reversible unless they affect your client’s substantive rights. It is your responsibility to articulate how the exclusion of evidence affects rights that are guaranteed by the United States Constitution and, when applicable, your State Constitution.

b. Impeachment vs. extrinsic evidence: FRE 608 and 404(b).

In the Federal Rules, what I refer to as the “400 Series,” is titled Article IV: Relevancy and Its Limits.” Then, Article VI, the “600 series,” is titled “Witnesses.” This division seems very strange at first glance. Why are the corresponding rules separated into two different sections, as both relate to the admission and exclusion of evidence? Because for evidence to be admitted, it has to be relevant, and, nine times out of ten, it is going to be admitted through a witness. The differences between these two articles are especially pertinent to a discussion of the offensive use of extrinsic evidence, as it relates to someone other than the defendant.

The explanation provided in the notes after F.R.E. 608 is as follows:

FRE 404(b) applies when extrinsic evidence is offered as relevant to an issue in the case, such as identity or intent, whereas FRE 608(b) applies when extrinsic evidence is offered to impeach a witness by showing the character of the witness for untruthfulness. Evidence admitted under 404(b) is substantive, impeachment evidence under 608(b) is not. Evidence offered under 404(b) may be proven by extrinsic evidence whereas evidence offered under 608(b) may not.

Notes, Fed. R. Evid. 608. This division of information would not be such a big problem, if it did not cause courts and lawyers to start thinking that, in criminal cases, Rule 404(b) belongs to the prosecution, and Rule 608 belongs to the defense. Because our clients and their defenses are routinely devastated by the prosecution's effective use of Rule 404(b), we tend to forget that the rule is available to both sides.

c. The defendant's affirmative use of FRE 404(b).

1. Get everyone comfortable with the idea that we can offer 404(b) evidence.

Lawyers and judges alike are unfamiliar with the idea that the defendant can offer evidence of other crimes or acts to prove something other than propensity. In fact, many federal opinions refer to the defense's proposed use of this rule as "reverse 404(b) evidence." See e.g. *United States v. Hamilton*, 48 F.3d 149, 155 n.8 (5th Cir. 1995). In *State v. Hesson*, 110 Ohio App. 3d 845, 675 N.E. 2d 532 (1996), the Court commented that "[t]he parties and the court are unable to locate any case where *Evid R. 404(b)* was applied to admit evidence of other acts of a witness." But there is nothing in the rule that makes it unavailable to the defense. It provides:

Evidence of other crimes, wrongs, or acts is not admissible to prove the character **of a person** in order to show conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident, provided that upon request by the accused, the prosecution in a criminal case shall provide reasonable notice in advance of trial, or during trial if the court excuses pretrial notice on good cause shown, of the general nature of any such evidence it intends to introduce at trial.

Fed. R. Evid. 404(b)(emphasis added).

Note that the rule pertains to evidence of other crimes, wrongs, or acts “of a person,” not of the defendant. You may also note that the plain language of the rule imposes the notice requirement on the prosecution only. There is no reason why you should not use this rule when you seek to prove or disprove motive, intent, identity, etc. of your client, or someone other than your client.

The beauty of this rule is that if you can show that you are admitting the evidence for a proper purpose, i.e. a purpose other than character or propensity, then you do not have to worry about the limitations of Rules 405 and 608. It does not make a difference if the target of your evidence is a witness, because this is not impeachment. *See* Fed. R. Evid. 608. You do not have to confine the testimony to general reputation, and evidence of “specific instances” need not relate “an essential element . . . [of your] defense.” *See* Fed. R. Evid. 405. It is difficult to simply

remember that 404(b) evidence is NOT CHARACTER EVIDENCE, and it is not impeachment. So, the rules that limit the presentation of character evidence and impeachment are irrelevant. Look at it this way: 404(b) evidence is evidence that just happens to make somebody look bad, but offered for some other purpose.

For a full discussion on the *offensive* use of this rule, check the Training Materials section of www.fd.org. You will see material entitled *The Lazy Susan: Defendant's Affirmative Use of 404(b) Evidence*, by Michael Maloney and Pamela Hamrin.

2. Drug cases where defendants admitted 404(b) evidence.

The Tenth Circuit has a couple of interesting cases on this issue that are worth mention here. One that I really enjoy reading is *United States v. Montelongo*, 420 F.3d 1139 (10th Cir. 2005.) This was a drug case where the defendants were operating a truck carrying a load of narcotics on the interstate. There was a prior traffic stop of another truck that was owned by the same trucking company that employed these defendants, but that stop involved other drivers. All of the codefendants initially moved to exclude any testimony of this prior incident. At trial, the government called the owner of the trucking company to testify that he checked the truck and it was clean when defendants got it. After his direct, the defendants decided they wanted to cross-examine him about the prior incident that they previously convinced the court to

exclude. Defense counsel argued that it was relevant to support defense theories that the owner of the company conspired with the “other” codefendant, and that their client did not know the drugs were in the truck. The district court excluded the evidence and they were all convicted. The Tenth Circuit reversed. It held that evidence regarding the prior incident with another truck owned by the same owner was relevant to each defendant’s theory that they lacked knowledge of the marijuana packed in the truck they were driving. *Id.* at 1173. “[I]n this way, the previous case is relevant as it tends to make it less probable that the defendants knowingly possessed the marijuana or that they knowingly and voluntarily involved themselves in a drug conspiracy.” *Id.*

The *Montelongo* case was thoroughly analyzed in an unreported district court opinion from New Mexico. In *United States v. Moreau*, 2008 WL 2229467, the district court found that the defense would be able to admit evidence, pursuant to 404(b), about a third-party’s prior distribution of drugs.

Moreau was arrested after agents found 2,700 pounds of marijuana in a trailer he was operating along with his co-defendant. The investigation in this case led law enforcement to a warehouse in Tempe, Arizona. They met a witness there who told them that Mr. Moreau and his co-defendant purchased a quantity of old, worthless fabric that was later found in the trailer, concealing the marijuana. The prosecution listed the person at the warehouse who sold this fabric as a government witness who

would be used to prove the defendants' knowledge of the marijuana.

The government then learned that this witness had prior convictions for distribution of marijuana himself and decided to withdraw his name from their list of witnesses. The defense counsel wanted to admit the convictions, and the facts of the arrests that led up to these convictions. In 1985, the witness was caught with 25 pounds of marijuana in his car. In 1987, the witness was convicted of distribution of marijuana and cocaine. Most interestingly, in 1993, the witness was caught on the interstate with 28 pounds of marijuana in his car. He told the investigating officer in that case that he was the manager of the same warehouse where Moreau and his codefendant allegedly bought this useless fabric.

Like myself, Moreau took exception to the term, "reverse 404(b) evidence," but for a completely different reason. Moreau contended that the term "reverse 404(b)" evidence is "misleading" because rule 404(b) is inapplicable when evidence of prior bad acts is offered by the defendant. Moreau covered all bases with respect to the purposes for admitting the evidence under rule 404(b):

Moreau contended that the evidence is relevant to demonstrate that the witness had opportunity to distribute marijuana. Moreau contended that the evidence is relevant to demonstrate that the witness had the knowledge to operate a "sophisticated" marijuana operation. Moreau argued that the evidence is relevant to demonstrate ability and intent.

Id. at 4. The government posited that the evidence should not be admitted because it did not show that Moreau was innocent, even if it showed that the witness was involved. Moreau successfully argued, however, that by implicating a third party, the evidence tended to show that the conspiracy was “capable of proceeding successfully without his knowledge.” *Id.*; *United States v. McCourt*, 925 F.2d 1229 (9th Cir. 1991) (“Because Rule 404(b) plainly proscribes other crimes evidence of ‘a person,’ it cannot reasonably be construed as extending only to an accused.”)

This opinion lays out most of the jurisprudence and arguments you will need to litigate this issue. It shows that almost all of the circuits, except for the Tenth, have determined that there is a lower standard for admissibility under 404(b) when it is offered by the defendant. Second, it provides strong support for the argument that Rule 404(b) applies to the acts of third parties. *Agushi v. Duerr*, 196 F.3d 754 (7th Cir. 1999). The district court also expressed its concern about Moreau’s constitutional rights under the Fifth and Sixth Amendments to call this witness and present his defense. The court determined, however, that it was unnecessary to decide this issue after finding the evidence was admissible under 404(b).

Mentioning the defendant’s constitutional rights separately raises yet another issue. Even if the defense could not prove admissibility under Rule 404(b), a defendant can always argue that relevant evidence should be admitted, because it is

needed to protect the accused's Sixth Amendment right to present his defense. "The Tenth Circuit has recognized that the defendant's right to call witnesses in his favor is within the ambit of his constitutional right to present a defense. See *United States v. Talamante*, 981 F.2d 1153, 1157 (10th Cir. 1992).

The same district court judge, James O. Browning, gave the same analysis in deciding to admit 404(b) evidence proffered by the defendant in *United States v. Duran-Moreno*, 616 F.Supp.2d 1162 (D.N.M. 2009). Once again, this case involved drugs (cocaine) hidden in the defendant's car. But this time, the defendant wanted the jury to hear that the prior owner of the car had a conviction for possession of methamphetamine. The district court found once again that a third party's conviction was relevant:

Because Duran-Moreno is contending that he had possession of the drugs in the Impala because of some accident or mistake, and not intentionally, he needs to establish that someone else put the drugs there for his defense to be credible. The evidence has "a tendency to make" Salazar's involvement in this case "more probable than it would be without the evidence."

A small amount of methamphetamine hidden in a can and large amount of cocaine and methamphetamine hidden in a car's bumper are certainly two different things. The two scenarios are not completely different, however. They both involve concealing drugs and both are indicative of trafficking or dealing in drugs. Moreover, the combination of experience in the drug trade and access to the Impala makes it at least somewhat "more probable" that Salazar

placed drugs in the Impala.”

Id. at 1172-73.

There are always good ideas for theories of admissibility in district court cases, and many are unreported. Look at the five- page opinion in *United States v. Manners*, 2006 WL 3026110 (N.D. Tex.) While this short opinion never mentioned the actual charges, it apparently was a fraud case. One of the codefendants decided to cooperate and entered a guilty plea. At a proffer meeting, he confessed to several crimes he committed during the pendency of the case which included the fraudulent purchase of a car, a forged lease application, and an attempted bribe of a case agent.

The issue in this opinion was whether the defense should be able to disqualify the prosecutor in this case and call him as a witness to testify about these admissions the witness made. But the court first had to establish that the evidence was relevant and admissible under 404(b). It stated:

Here, the Defendants are attempting to introduce evidence of Burgess’s prior deceptive acts to show that “Burgess masterminded the scheme charged in the indictment and then obtained the unwitting cooperation of others by forging and falsifying documents, engaging in identity theft and applying the force of his apparently very convincing personality.” Under [*United States v. McClure*, 546 F.2d 670 (5th Cir. 1977)] this evidence is relevant to the defendants’ defense of lack of criminal intent and is admissible under Federal Rule of Evidence 404(b).

Id. at 2. The district court proceeded to deny the defendant’s motion to disqualify the

prosecutor because Burgess's former attorney was present at the meeting and could be called as a witness to give the exact same testimony.

The scope of cross-examination of the testifying informant, or snitch, will usually be wide as long as the snitch is on the stand. You may have instances, however, when the government proceeds without the snitch's testimony. In either case, you should develop various theories of admissibility of the information you learn about the person who allegedly set up your client. You certainly should be able to admit evidence that the snitch is still involved in the drug trade, and that the snitch has other possible suppliers of drugs, besides your client.

In *United States v. Stephens*, 365 F.3d 967 (11th Cir. 2004), the Eleventh Circuit reversed a conviction where the defendant was not allowed to present this type of evidence to the jury. The appellate court focused on the materiality of the evidence to the defense theory:

Stephens' attorney never argued that he was seeking to introduce the witnesses' testimony simply to show that, because Robinson was a drug dealer on certain prior occasions, he was acting as a drug dealer on the days he interacted with Stephens. Indeed, the whole premise of the Government's case was that Robinson was acting as an undercover drug buyer from Stephens on those occasions.

Instead, defense counsel sought to introduce this evidence "for other purposes" -specifically, to show that Robinson could have obtained the methamphetamine he turned over to the Government from a source other than

Stephens. This is directly material to Stephens' defense that Robinson was setting him up just to get out of a lengthy jail sentence. With evidence of Robinson's other drug transactions excluded, the jury could have inferred that the drugs turned over to [law enforcement] had to have come from Stephens.

Id. at 974-75.

You may notice in this case, and others, that it does not matter whether the evidence excludes your client as the source of drugs, it only has to provide the jury with evidence that there existed another possible source. You will also notice, once again, that the appellate courts seem to find it important that the defendant clearly articulated his theory of defense and how the evidence supported that theory. *See United States v. Gonzalez*, 140 Fed.Apps. 170 (11th Cir. 2005)(Exclusion of testimony about a prior drug trafficking relationship between defendant's alleged customer and the customer's alleged true drug supplier was an abuse of discretion.)

In *United States v. McClure*, 546 F.2d 670 (5th Cir. 1977), the Fifth Circuit reversed a conviction for drug distribution where the defendant was unable to put on 404(b) evidence regarding the confidential informant's violence. Michael McClure claimed that he used heroin and cocaine, kept quantities of this drug at his home, and would occasionally share it with friends, but he never sold the drugs for a profit. Brian Carroll approached DEA Agent Rhuben McGee about working as a drug informant. McGee knew Carroll had a "speckled reputation" for violence. Carroll,

a bouncer, had a scuffle with a drug dealer and he was charged with aggravated assault. In a two hour conversation, Carroll convinced McGee that he wanted to mend his ways and bring drug dealers to justice. McGee hires him and agrees to pay him \$50 for every new seller of a gram of heroin and \$100 for every new seller of an ounce. At the time, Carroll had no other source of income.

Agent McGee tells Carroll that somebody named Mike was rumored to deal heroin. Within a couple of weeks, Carroll has Michael McClure involved in two sales to Agent McGee. At trial Mr. McClure was able to testify that he heard Carroll was an enforcer, that he was known for throwing people through windows, and that Carroll scared him into these drug deals. He said that he told Carroll that he did not want to do the deals but that Carroll intimidated him into doing so.

McClure also tried to call witnesses to the stand who would say that Carroll had coerced them into selling heroin during the same time frame, that he carried a gun, and that he threatened to kill them if they did not produce. McClure sought this testimony to prove a “lack of intent” on his part. The trial judge excluded the testimony because these events occurred after the McClure’s transactions.

The Fifth Circuit held that the exclusion of this testimony was reversible error.

The court stated:

We hold that under Fed. R. Evid. 404(b) evidence of a systematic campaign of threats and intimidation against

other persons is admissible to show lack of criminal intent by a defendant who claims to have been illegally coerced. Rule 404(b) is normally used by the government to show evidence of prior offenses committed by the defendant. In such cases, it stands for admissibility to protect the defendant from prejudice. [Citations omitted.] But in the case before us it was the defendant who sought to introduce evidence of the informant's scheme. His right to present a vigorous defense required the admission of the proffered testimony. The fact that it referred exclusively to threats made by Carroll after the sales by appellant affects its weight but not its admissibility.

Id. at 672-73. We should note that the *McClure* case was cited by a district court in *United States v. Manners*, 2006 WL 3026110 (N.D. Tex 2006) as good law.

d. Fed. R. Evid. Rule 106, “The Rule of Completeness,” and omitted portions of your client’s confession.

In many instances, the government gets to choose portions of your client’s statement that they want to admit in evidence, and simply omit the parts that you may want the jury to hear. What can you do? Your client’s statement is hearsay, unless it is offered by the government as an admission by a party-opponent. Fed. R. Evid. 801(d)(2). You can try to admit the good parts of your client’s statement under Fed. R. Evid. Rule 106, also known as the “rule of completeness.” It provides:

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

Fed. R. Evid. 106 (emphasis added). This is a rule that developed from the common law principle that protects a party from the prejudice of having a portion of a

statement introduced out of context. It is a rule of timing that allows you to “break the government’s flow” when they throw a foul ball, or when they simply fail to present the full context of a statement. You do not, and should not, wait until cross examination to introduce favorable parts of a recorded statement, record, or report when the prosecution has extracted selected portions to be played before the jury. The proper time to use Rule 106 is during your opponent’s direct examination. In fact, a defendant may be barred from relying on the rule if you wait until your cross examination. *See, e.g. United States v. Larranaga*, 787 F.2d 489 (10th Cir. 1986).

The rule only applies to “writings” and “recordings,” not unrecorded oral conversations. You may, however, be able to use this same principle with Rule 611 when trying to admit portions of oral conversations.

The issue of whether it applies to evidence that is “otherwise inadmissible,” is the topic of much debate. In *United States v. Bucci*, 525 F.3d 116, 133 (1st Cir. 2008), the First Circuit held that “the rule of completeness may be invoked to facilitate the introduction of otherwise inadmissible evidence.” Other courts have held that the defendant, as the proponent of the evidence, has the burden of showing that it is admissible and that the evidence passes the “fairness test.” It must be relevant, and it must “qualify, explain, or place into context the portion already introduced.” *United States v. Pendas-Martinez*, 845 F.2d 938, 944 (11th Cir. 1988); *United States v.*

Branch, 91 F.3d 699, 728 (5th Cir. 1996); *United States v. Walker*, 652 F.2d 708 (7th Cir. 1981).

Significant issues arise when the government seeks to introduce portions of a taped or written confession under Rule 801, and the defendant seeks to contemporaneously introduce other portions of the same statement that either “qualify, explain, or place into context” the admissions that were introduced. Generally, a party is not allowed to admit his own prior recorded statements because those statements are hearsay and the admissions are not offered by a party-opponent. This general principle is most likely to preclude you from introducing portions of your client’s confession, because it is not “otherwise admissible.” However, there are federal court opinions, mainly from the First, Second, and Seventh Circuits, that liberally apply this rule when the defense has no other way to fairly explain the confession, without taking the stand. In *United States v. Marin*, 669 F.2d 73, 85 n.6 (2nd Cir. 1982) the Second Circuit analyzed this situation:

[W]hen the government offers in evidence a defendant’s confession and in confessing the defendant has also made exculpatory statements that the government seeks to omit, the defendant’s Fifth Amendment rights may be implicated. In such circumstances, the Seventh Circuit has stated that the Fifth Amendment right to remain silent is violated when the omission paint[s] a distorted picture which [the defendant is] powerless to remedy without taking the stand and results in substantial prejudice to the defendant.

The Second Circuit went on to require the admission of parts of the statement that supported the defense theory. *Id.* The reasoning in the favorable opinions on this issue balance the spirit of the rule with the constitutional right to present a defense, along with the defendant's constitutional privilege against self-incrimination.

Just a few months ago, a district court in Maine ruled that if the government wanted to admit a handwritten statement of the defendant in their case-in-chief, they must also admit a statement the defendant typed five days later. *United States v. Young*, 2010 WL 1461558 (D.Me. April 9, 2010). Once again, this opinion may have limited precedential authority, but it provides a great example of how you can use the rules of evidence to your advantage.

In *Young*, the defendant was interviewed by federal agents on July 25, 2007. He provided a handwritten statement admitting that he received and spent social security benefit checks after his wife's death. In that statement, he stated that he first thought he was receiving the checks as a refund, but then "came to know" that the payments were "unentitled benefits."

Five days later, Young typed a statement documenting the interview with the agents. In this statement, however, he explained why he believed the payments were a refund, and also explained that he believed the refund was completed when the payments stopped. This second statement was provided to the government when they

subpoenaed records from the defendant's employer. The government argued that the second statement should not be admitted because it was not an addendum to his initial statement, and that if there are misunderstandings in his statement, he could clarify it by taking the stand.

The court held that if the government admits one statement, it is only fair to admit the other:

Here, the Court concludes that if the Government seeks to admit one confession, it should admit the other. The implication that the July 25, 2007 statement was Mr. Young's only explanation, an explanation that runs contrary to his defense theory at trial, and the impact of the admission of only one statement and not the other on his Fifth Amendment right against self-incrimination are the deciding factors.

Id. at 4. We can ask whether the district court was genuinely convinced that the second statement was needed to clarify, explain, or correct the context of the first statement if we wish. It is probably a safer bet to conclude that the court was concerned that, under the defense theory, the second document clarified the first and that the only way to guarantee the defendant's constitutional rights was to admit both statements and allow the jury to decide. The court's concerns about the defendant's constitutional right to admit evidence that furthers his theory of defense will always trump mechanical limitations of the Federal Rules of Evidence. As stated in FRE Rule 102:

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

The following excerpt from training materials composed by Professor Barbara Bergman and Attorney Nancy Hollander¹ is republished here, because I can not state it better than they do:

This is a tricky question and the courts have not been consistent in its answer. Generally, Rule 106 is considered a rule that changes the normal order of proof rather than dealing with the substance of the evidence. Several arguments, however, favor permitting otherwise admissible evidence to come in under Rule 106. First, the rule contains no proviso, as is found in every major rule of exclusion in the rules, i.e. “Except as otherwise provided by these rules.”

In *United States v. Sutton*, 801 F.2d 1346, 1367 (D.C. Cir. 1986) the appellate court held that the trial court should have permitted portions of the taped conversation although it was otherwise inadmissible, but the appellate court found that the error was harmless. The Seventh Circuit reached a similar conclusion in *United State v. LeFevour*, 798 F.2d 977 (7th Cir. 1986). “If otherwise inadmissible evidence is necessary to correct a misleading impression, then either it is inadmissible for this limited purpose . . . or, if it is inadmissible (maybe because of privilege), the misleading evidence must be excluded too.” *Id.* at 980.

The Creative Uses of Evidence, Bergman and Hollander, p. 13. Published online at

¹These are excellent training materials available on line at www.fd.org entitled *The Creative Uses of the Federal Rules of Evidence*, by Barbara Bergman and Nancy Hollander.

www.fd.org.

When you research this issue, you will find numerous cases that your opponent will be able to use in their argument against you. Do not be discouraged. Remember that the evidentiary rulings that favor our side are rarely published, or even written since the government is unlikely to appeal them. You should look at district court opinions, and unpublished opinions to give you ideas about how to argue the issue in your case.

e. 801(d)(2): The government makes admissions too.

Fed. R. Evid. 801(d)(2) provides that a statement is not hearsay when it is an “admission” by that party, and it is offered into evidence by that party’s opponent. The rule provides five different ways in which a statement can be considered a party’s admission. In a criminal trial, admissions are usually offered under 801(d)(2)(B), “a statement of which the party has manifested an adoption or belief in its truth.”

There is much division among the circuits on what types of statements are admissible as government admissions. The issue most often arises when the defendant seeks to admit statements in pleadings filed by the government, or statements made by the prosecution in an opening or closing argument. The First, Sixth, Eighth, Ninth, and District of Columbia Circuits hold that the rule applies without qualification to statements made by the government. *United States v. Kattar*, 840 F.2d 118 (1st Cir.

1988), *United States v. Warren*, 42 F.3d 647, 655 (D.C. Cir. 1994); *United States v. Morgan*, 581 F.2d 933, 937 n. 10 (D.C. Cir. 1978); *United States v. Van Griffen*, 874 F.2d 634, 638 (9th Cir. 1989) (government manual).

The Fifth and Seventh Circuits hold the exact opposite. *United States v. Zizzo*, 120 F.3d 1338, 1351 n.4 (7th Cir.), *cert. denied sub nom. United States v. Marcello*, 522 U.S. 988 (1997). *United States v. Garza*, 448 F.3d 294, 298 (5th Cir. 2006) *United States v. Powers*, 467 F.2d 1089, 1097 n.1 (7th Cir 1972)(Stevens, J., dissenting), *cert. denied*, 410 U.S. 983 (1973).

The Second, Fourth and Eleventh Circuits hold that the admission of statements by government agents is severely restricted. *United States v. McKeon*, 738 F.2d 26 (2d Cir. 1984); *United States v. Salerno*, 937 F.2d 797, 811 (2d Cir. 1991); *United States v. Ford*, 435 F.3d 204, 215 (2d Cir. 2006); *United States v. GAF Corp.*, 928 F.2d 1253, 1260 (2d Cir. 1991); *United States v. Flood*, 806 F.2d 1218, 1221 (4th Cir. 1986).

In *United States v. DeLoach*, 34 F.3d 1001, (11th Cir. 1994) the 11th Circuit held that the prosecutor's comments in closing argument made during the trial of codefendant Darrell Brown, was inadmissible during DeLoach's trial. Despite the loss for the defense, the case presents facts and analysis worth discussion here.

This was a fraud case where DeLoach was the closing attorney for his client and

codefendant Darrell Brown, a real estate developer who sold condominiums. The basic scheme was that Brown would agree to sell condos with buyers at a price substantially below the appraisal value. The parties told the lender, however, that the selling price was the appraised value and the lender would loan that amount. The deal would close at that amount. The seller would then “refund” to the buyer the amount received in excess of the agreed price which would be used as a “cash reserve” to make mortgage payments.

Brown was indicted in a separate case, involving the same scheme, with a different codefendant. His defense in that case was that he relied on advice of counsel. *Id.* at 1003. At the close of that trial, the prosecutor made the following comments during closing argument:

“[A] reasonable inference could be drawn from that particular incident at Biscayne Federal is DeLoach told them if you tell the bank it is okay;” and “Mr. Brown himself admitted, Guy DeLoach did not advise him not to tell the bank.”

Id. at 1005. The defense sought to use these statements to support their theory that Brown was acting on his own and not on the advice of counsel. The statements obviously *suggest* that the prosecution was telling the jury that DeLoach did not advise Brown to conceal the truth about the actual price, and that he advised him that if he disclosed these material facts to the bank, the deal is legal. The apparent problem is

that the prosecutor only argued to the jury that they could infer this based on the evidence submitted at that trial, especially since Brown testified to this effect.

The Eleventh Circuit adopted the standards articulated by the Second Circuit in *United States v. McKeon*, 738 F.2d 26 (2nd Cir. 1992). The Court stated:

Only the Second Circuit has squarely addressed this issue. In *McKeon*, the court said that opening statements of a defendant's attorney in a criminal case are admissible under Rule 801(d)(2) where they are: 1) "assertions of fact" that are the "equivalent of a testimonial statement by the [client];" and 2) "inconsistent with similar assertions in a subsequent trial."

DeLoach, 34 F.3d at 1005; quoting *McKeon*, 738 at 33. The court found that the comments at the prior trial were not assertions of facts since the prosecution was only suggesting that the jury could draw those inferences from the evidence, and that the comments were not inconsistent with the prosecution's theory of the case. This is probably why we regularly hear cautious prosecutors often use the magic words, "a reasonable inference can be drawn. . . ." Not all prosecutors are going to be so cautious when they are in the heat of battle. Defense counsel should obviously look at the prosecution's comments in opening and closing arguments for assertions of facts. Also, considering the wide range of division, it would not be surprising for the Supreme Court to consider this issue at some point. You should therefore argue for admissibility regardless of the state of the law in your jurisdiction since we never know when it may change.

It is true that the Courts are generally hesitant to attribute statements by government employees as party admissions. For instance, statements of law enforcement officers are generally not admissible against the prosecution as an admission of a party-opponent, 2 *Giannelli & Snyder, Baldwin's Ohio Practice, Evidence* (2001) 45, Section 801.28; but there are several exceptions to this rule. See *United States v. Kampiles*, 609 F.2d 1233, (7th Cir. 1979), *United States v. Kendrick*, 853 F.2d 492 (6th Cir. 1988); *United States v. Pravette*, 16 F.3d 767, n. 9 (7th Cir. 1994). For instance, the D.C. Circuit found that an officer's statements in a search warrant should have been admitted as party admissions, because they are "sworn assertions," and the government manifested a belief in their truth when the warrant was filed in court. *United States v. Morgan*, 581 F.2d 933 (D.C. Cir. 1978.) Under this reasoning, you can argue that any assertions made by the government in formal court proceedings or filings are admissible as government admissions. See *Creative Uses, supra* at pp. 16 -21; see also *Party Admissions in Criminal Cases: Should the Government Have To Eat Its Words*, 87 MNLR 401, Dec. 2002.

The D.C. Circuit has also found that an informant can make statements within the scope of his agency that are admissible under Fed. R. Evid. 801 (d)(2)(D). *United States v. Branham*, 97 F.3d 835, 851 (D.C. Cir. 1996). In that

case, the court found that it was error² to exclude statements the informant made “in order to establish a trusting relationship” with the defendant. The appellate court found that the informant could be considered an agent of the government. “Whatever [the informant] said during these conversations was in furtherance of that goal, and thus within the scope of the existing agency. *Id.*”

In trial preparation, you want to look for ammunition in all of the government pleadings, the affidavits in support of warrants, the complaint, the transcripts from prior trials or hearings, and their statements in appellate briefs.

f. 804(b)(3): Statement against interest - unavailable declarant.

You would obviously want the jury to know that someone other than your client admitted to the criminal conduct charged in the indictment. You would think that this should not be a difficult task, but this rule requires research and preparation. The rule itself requires that the statement was “at the time of its making so far contrary to the declarant’s pecuniary or proprietary interest, or so far tended to subject the declarant to civil or criminal liability . . . that a reasonable person in the declarant’s position would not have made the statement unless believing it to be true.” Fed. R. Evid. 804(b)(3). The rule also requires a showing

²Unfortunately for Mr. Branham, the court found the error was harmless and affirmed the conviction.

of sufficient corroboration to indicate the trustworthiness of the statement. *United States v. Spring*, 80 F.3d 1450, 1460 (10th Cir. 1996).

First of all, you must be prepared to show that the declarant is, in fact, unavailable. This should be no problem if the declarant comes to court and otherwise gives sufficient notice to invoke his Fifth Amendment right to remain silent. It is obviously not a problem if the declarant is dead. In almost any other circumstance, you will have to show due diligence in compelling the declarant to appear as a witness and testify.

You may remember that the landmark case of *Chambers v. Mississippi*, 410 U.S. 284 (1973) involved the exclusion of statements against penal interest that were exonerated the defendant of a murder. The Supreme Court held that where the indicia of reliability existed and the declarant's statements, if true, would have exonerated the defendant, they could not be excluded. *Id.* at 300. This was not a review of the federal rule, but it can be applied to any statement of the same character of the one in *Chambers*.

A common issue that arises when the defendant seeks to admit a third party's statement against penal interest regards the corroboration and reliability requirements. In anticipation of this objection, you should be prepared to argue how exclusion of the statement would deny your client's Fifth and Sixth

Amendment rights.

IV. CONCLUSION.

This material only provides a starting point for defense attorneys who want to take another look at how the rules of evidence can be used to forward their theory of defense. There are many more rules that should be cited when we seek to admit favorable evidence. The bottom line is that your client has a constitutional right to fully present his side of the story. The Federal Rules of Evidence should complement and enhance, rather than obstruct that guarantee.