

TRIAL
EVIDENCE
2021

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THE FEDERAL RULES OF EVIDENCE

The implementation of the Federal Rules of Evidence in 1975, codified what may be characterized as a boon for the prosecution. With its more expansive hearsay exceptions and so-called "catch-all" balancing tests, much is left to the discretion of the trial court.

However, the rules do provide the practitioner with a road map for litigation which has been divided into eleven general categories. A working knowledge of even five of these rules and how they operate in a criminal prosecution will serve both the accused and his Counsel well.

RULINGS ON EVIDENCE [FED. R. EVID. RULE 103]

Knowledge of the Rules is of little use to the client if his counsel fails to properly preserve an erroneous evidentiary ruling for appellate review. Where evidence is erroneously admitted Counsel must be mindful that error is preserved only where an objection is timely made, stating the specific ground for the objection, if the ground is not apparent from the context, Federal Rule of Evidence Rule 103(a)(1). *U.S. v. Hutcher*, 622 F.2d 1083 (2d Cir. 1980), *cert. denied*, 449 U.S. 875 (1980) (the phrase "I will object to that" is not sufficient); *U.S. v. Arteaga Limones*, 529 F.2d 1183 (5th Cir. 1976), *cert. denied*, 429 U.S. 920 (1976); *U.S. v. Sims*, 617 F.2d 1371 (9th Cir. 1980) (appellate court refused to consider hearsay objection other than the one made at trial).

Likewise, where evidence has been erroneously excluded, Counsel must make an offer of proof setting out the substance of the evidence that was not admitted, unless same is apparent from the context within which questions were asked. FED. R. EVID. Rule 103(a)(2); *U.S. v. Winkle*, 587 F.2d 705 (5th Cir. 1979), *cert. denied*, 444 U.S. 827 (1979) ("will not even consider the propriety of the decision to exclude evidence if no offer of proof was made at trial"). In addition, a party cannot argue new theories regarding the relevancy of evidence on appeal which were not presented to the trial court until post-trial motions; *U.S. v. Lara-Hernandez*, 588 F.2d 272 (9th Cir. 1978), *cert. denied*, 444 U.S. 827 (1979).

Rule 103(c) further provides that in order to prevent inadmissible evidence from being suggested to the jury during such preliminary determinations statements, offers of proof or asking questioning should be conducted out of the hearing of the jury. FED. R. EVID. Rule 103(c); *U.S. v. Millen*, 594 F.2d 1085 (6th Cir. 1979), *cert. denied*, 444 U.S. 829 (1979) (the prosecutor should have made offer of proof outside hearing of jury before asking question as to witness' "gay" relationship).

But See U.S. v. Masters, 840 F.2d 587 (8th Cir. 1988) (trial court does not abuse its discretion by refusing to rule on motion in limine).

PRELIMINARY QUESTIONS [FED. R. EVID RULE 104]

The Rules provide that preliminary questions concerning: (a) qualification of person to be a witness, (b) existence of a privilege or, (c) admissibility of evidence, must be determined by the court outside the presence of the jury. Federal Rule of Evidence 104. The rules of evidence do not apply to such proceedings, thus hearsay is admissible. *See* Rules 1101(d) and 104(a), Federal Rules of Evidence.

STATEMENTS OF CO-CONSPIRATORS

For example, under the rules, the admissibility of co-conspirators' statements, were formerly a question for the jury. *U.S. v. Apollo*, 476 F.2d 156 (5th Cir. 1973). Now, pursuant to Rule 104(a), the trial court has sole responsibility for determining the admissibility of extrajudicial conspirator's statements under rule 801(d)(2)(E). *United States v. James*, 590 F.2d 575 (5th Cir. 1979). To establish admissibility of such statements the prosecution must demonstrate that:

- (1) a conspiracy existed,
- (2) both the declarant and the defendant voluntarily joined the conspiracy,
- (3) the statement was made "during the course" of the conspiracy, and
- (4) "in furtherance" of the conspiracy.

See Bourjaily v. U.S., 483 U.S. 171, 107 S.Ct. 2775, 97 L.Ed.2d 144 (1987); *U.S. v. Santiago*, 837 F.2d 1545, 1549 (11th Cir. 1988); *U.S. v. Ascarrunz*, 838 F.2d 759, 762 (5th Cir. 1988); *U.S. v. Smith*, 833 F.2d 213, 218-22 (10th Cir. 1987); *U.S. v. Krohn*, 573 F.2d 1382 (10th Cir. 1978); *U.S. v. Jones*, 542 F.2d 186, 202 n.11 (4th Cir.), *cert. denied*, 426 U.S. 922 (1976); *U.S. v. Boucher*, 796 F.2d 972, 974 (7th Cir. 1986).

WHAT STANDARD IS APPLIED?

The Supreme Court adopted a "preponderance of the evidence" standard for the admission of co-conspirator's statements, rejecting any higher standard such as "clear and convincing" or "beyond a reasonable doubt". *Bourjaily v. U.S.*, 483 U.S. 171, 97 L.Ed.2d 144, 152-53, 107 S.Ct. 2775 (1987).

"We find 'nothing to suggest that admissibility rulings have been unreliable or otherwise wanting in quality because not based on some higher standard.'" *Bourjaily v. U.S.*, 483 U.S. 171, 97 L.Ed.2d at 153.

Failure to reassert the objection may result in a waiver of that issue on appeal. *See U.S. v. Chaney*, 662 F.2d 1148, 1154 (5th Cir. 1980) (limiting review to "plain error" standard, where, "at the close of evidence, the appellant did not request that the trial court determine whether the prosecution had...establish[ed] by a preponderance of the evidence that a conspiracy existed").

Where an element of the offense is specific intent, counsel should contend that more proof is required to prove the existence of a conspiracy requisite for the admission of a co-conspirator's statement *U.S. v. Davis*, 583 F.2d 190 (5th Cir. 1978) [to sustain conviction for conspiracy the government must prove at least the degree of criminal intent necessary for the substantive offense, specific intent requires the government to prove that the defendant voluntarily and intentionally violated a known legal duty).

WHAT EVIDENCE MAY BE CONSIDERED?

Prior to the Supreme Courts opinion in *Bourjaily v. U.S.*, 483 U.S. 171, 97 L.Ed.2d 144, 152-53, 107 S.Ct. 2775 (1987) appellate courts had held that the trial court should look only to non-hearsay evidence, "independent of the statement itself".

"Otherwise hearsay would lift itself by its own bootstraps to the level of competent evidence". *U.S. v. Stroupe*, 538 F.2d 1063, 1065 (5th Cir. 1976).

See e.g., Glasser v. U.S., 315 U.S. 60, 74-75 (1942); *U.S. v. Petrozziello*, 548 F.2d 20, 22-23 (1st Cir. 1977); *U.S. v. James*, 590 F.2d 575, 578-80 (5th Cir.) (en banc), *cert. denied*, 442 U.S. 917 (1979); *U.S. v. Santiago*, 582 F.2d 1128, 1133 (7th Cir. 1978); *U.S. v. Bell*, 573 F.2d 1040, 1043-44 (8th Cir. 1978); *U.S. v. Jackson*, 627 F.2d 1198, 1217-1218 (D.C. Cir. 1980); *U.S. v. Nixon*, 418 U.S. 683, 701 n.14 (1974).

In *Bourjaily v. U.S.*, 483 U.S. 171, 107 S.Ct. 2775 97 L.Ed.2d 144 (1987), the Supreme Court held that a trial court may consider the co-conspirator's hearsay statement in addition to other matters when deciding its admissibility. That is, the court has sanctioned looking to what is by definition, unreliable evidence, to determine that evidences' reliability. In *Bourjaily*, other corroborating evidence, independent of the incriminating hearsay statements, was together with the co-conspirator=s statements held sufficient to establish the existence of the conspiracy. *Id.*

See also U.S. v. Perez, 823 F.2d 854, 855 (5th Cir. 1987) [such hearsay can "be considered along with the other evidence in determining whether the hearsay declarant was the defendant's co-conspirator"]; *U.S. v. Ochs*, 842, F.2d 515 (1st Cir. 1988) [hearsay and non-hearsay evidence, coupled together, proved by a preponderance of the evidence that a conspiracy existed and that the defendant, against whom the hearsay evidence was offered, was a member of the conspiracy]; *U.S. v. Emuegbunam*, 268 F.3d 377 (6th Cir. 2001)[while court may consider content of co-conspirator statements as part of proof of a conspiracy, they are not enough by themselves to establish the existence of a conspiracy or the defendants role in it.].

Thus the co-conspirators statements alone will not suffice to render them admissible if additional information does not establish the conspiracy and the defendants participation in it. *U.S. v. Silverman*, 861 F.2d 571 (9th Cir. 1988) [when the proponent of the co-conspirator's statement offers no additional proof of defendant's knowledge of and participation in the conspiracy, the statement must be excluded from evidence].

ACTUAL HEARING REQUIRED?

Two Fifth Circuit panels have given lip service to the fact that "such a *hearing is mandated* by *U.S. v. James*".

See U.S. v. Grassi, 616 F.2d 1295, 1300 (5th Cir.), *cert. denied*, 449 U.S. 956 (1980);
U.S. v. Perry, 624 F.2d 29, 31 (5th Cir. 1980) [allowing the government an "interlocutory appeal" under 18 U.S.C. ' 3731 from an unfavorable ruling];
U.S. v. Vinson, 606 F.2d 149 (6th Cir. 1979).

Contra U.S. v. Hawkins, 661 F.2d 436 (5th Cir. 1981).

"Defendants challenge the trial court's decision not to hold a hearing pursuant to *U.S. v. James* to determine the admissibility of coconspirator statements. Under *James*, decided by this Court sitting en banc, a coconspirator's hearsay statement is not admissible unless the trial court determines the Government has established by a preponderance of the evidence independent of the statement itself that a conspiracy existed, that the coconspirator and the defendant against whom the statement is offered were members of the conspiracy, and that the statement was made during the course of the conspiracy. The Court in *James* held that a hearing on this issue was preferred but not required." *U.S. v. Hawkins*, 661 F.2d at 449.

The *James* court, however, took pain to note that a hearing is the "preferred" course, and that in any event, their opinion established only the "minimum standard for admissibility of co-conspirator statements" and that "[N]othing stated [in the opinion] shall prevent a trial judge from requiring more meticulous procedures". *U.S. v. Hawkins*, 661 F.2d at 583. However, with the abolition of the *James* constraints for determining the admissibility of co-conspirator's statements, the preference for such an independent hearing is in doubt. *See U.S. v. Perez*, 823 F.2d 854, 855 (5th Cir. 1987).

NOT ENOUGH TO PROVE THE CONSPIRACY OR THAT BOTH ACCUSED AND DECLARANT VOLUNTARILY PARTICIPATE IN SAME

It must be borne in mind that merely showing a conspiracy existed and that both the defendant and the declarant voluntarily become members of same does not meet the requisites of Rule 801(d)(2)(E). "In addition to a showing that a conspiracy existed and the Defendant voluntarily

participated in it, Rule 801(d)(2)(E) requires that the particular statement offered have been made both "during the course" and "in furtherance" of the conspiracy.

See *U.S. v. Meacham*, 626 F.2d 503, 510-11 n.8 (5th Cir. 1980);
U.S. v. Postal, 589 F.2d 862 (5th Cir.), *cert. denied*, 444 U.S. 832; *U.S. v. Caro*, 569 F.2d 411 (5th Cir. 1978);
U.S. v. Wilkerson, 469 F.2d 963, 968 (5th Cir. 1972), *cert. denied*, 410 U.S. 986 (1973);
U.S. v. Williamson, 450 F.2d 585, 590-91 (5th Cir. 1971), *cert. denied*, 405 U.S. 1026;
U.S. v. Green, 600 F.2d 154 (8th Cir. 1979);
U.S. v. Eubanks, 591 F.2d 513 (9th Cir. 1979);
U.S. v. Lang, 589 F.2d 92 (2d Cir. 1978);
U.S. v. Holder, 652 F.2d 449, 450 (5th Cir. 1981);
U.S. v. Portier, 623 F.2d 1017, 1020 (5th Cir. 1980).

See generally 4 Louisell, Federal Evidence ' 427at 33.

"DURING COURSE"

There was a "general rule that the arrest of the coconspirators puts an end to the conspiracy" and a coconspirator's subsequent "statement incriminating the other defendants [is] not admissible at their trial." *U.S. v. Meacham*, 626 F.2d at 503. However, in *U.S. v. Recio*, 537 U.S. 270, 123 S.Ct. 819 (2003), the Supreme Court recently held that a conspiracy does *not* automatically terminate when the government frustrates its objectives (emphasis added). The Ninth Circuit opinion below had held that the drug conspiracy ended when the police arrested a courier and seized the drugs. Thus, it reasoned, two men arrested in a subsequent sting could not be charged with the original conspiracy.

But see *U.S. v. Palow*, 777 F.2d 55, 59-60 (6th Cir. 1985) [statements by co-conspirator implicating defendant after defendants' arrest was not in course of the conspiracy];
State v. Rivenbark, 533 A.2d 271 (Md. 1987)[co-conspirator's statements made long after the burglary that was the principal aim of the conspiracy were not admissible against defendants];
Fuson v. Jago, 773 F.2d 55, 59-60 (6th Cir. 1985) [statements by co-conspirator implicating the defendant after his arrest held not to be "during the course of the conspiracy"].

Contra *U.S. v. Baines*, 812 F.2d 41 (1st Cir. 1987). Although Rule 801(d)(2)(E) expressly requires that a co-conspirator's statement is only admissible if it was made "during the course" of a conspiracy, at least one court has held that a statement regarding the possibility of the defendant's entry into a conspiracy (obviously made before the conspiracy was entered into) was nevertheless admissible under the Rule. *Baines*, 812 F.2d at 41.

"IN FURTHERANCE"

Similarly, statements made by a fellow co-conspirator who is also a paid government informer are not admissible under the "co-conspirator's exception" to the hearsay rule because, recognizing the "agency fiction" underlying this rule, such individual was not at the time acting as the agent of his co-conspirators, but rather as the agent of the government. Furthermore, statements were not made "in furtherance of the conspiracy but rather to frustrate it".

See *U.S. v. Wilkerson*, 469 F.2d 963, 968 (5th Cir. 1972);
U.S. v. Williamson, 450 F.2d 585, 590-1 (5th Cir. 1981), *cert. denied*, 405 U.S. 1026 (1972).

See also *U.S. v. Summers*, 598 F.2d 450 (5th Cir. 1979);

Mere puffing, bravado or braggadocio, even by one who has been shown to have become a member of the conspiracy, does not fit the requirements of Rule 801(d)(2)(E), where the statement could not be said to have been made to further some conspiratorial goal. *U.S. v. Fielding*, 645 F.2d 719 (9th Cir. 1981).

However, buffing, boasts and braggadocio are admissible when the declarant uses them to obtain the confidence of others involved in or being recruited for the conspiracy. *U.S. v. Santiago*, 837 F.2d 1545, 1549 (11th Cir. 1988); *U.S. v. Miller*, 664 F.2d 94, 98 (5th Cir. Unit B, 1981), *cert. denied*, 459 U.S. 854 (1982).

CO-CONSPIRATOR'S EXCEPTION SHOULD NOT BE EXPANDED

The drafters of the Federal Rules evinced their intention that the co-conspirator's exception not be expanded:

"The agency theory of conspiracy is at best a fiction and ought not serve as a basis for admissibility beyond that already established."
Advisory Committee Notes, Federal Rules of Evidence
801(d)(2)(E).

See *U.S. v. Emmert*, 829 F.2d 805 (9th Cir. 1987) [attempt to admit co-conspirator's statement under Federal Rules of Evidence, Rule 801(d)(2)(E) is precluded when the same is an inadmissible statement of memory or belief offered to prove the fact remembered or believed under Federal Rules of Evidence. 803(3)].

ADVISORY COMMITTEE OBSERVED DISTINCTION BETWEEN HEARSAY RULE AND CONFRONTATION CLAUSE

-Furthermore, in drafting the Federal Rules of Evidence the Advisory Committee noted the distinction between the Hearsay Rule and the Confrontation Clause:

"[T]he impact of the Clause clearly extends beyond the confines of the hearsay rule.... In recognition of the separateness of the Confrontation Clause and the Hearsay Rule and other exclusionary principles, the exception set forth in Rules 803 and 804 are stated in terms of exemption from the general exclusionary mandate of the hearsay rule, rather than in positive terms of admissibility." Advisory Committee Notes, Federal Rules of Evidence Art. VIII.

IS THERE A CONFRONTATION OBJECTION BEYOND HEARSAY?

Despite the Advisory Committee's admonitions, the Supreme Court has held that the co-conspirator's exception is so "steeped in our jurisprudence", that the Sixth Amendment Confrontation Clause provides no greater protections than those found in Rule 801(d)(2)(E) of the Federal Rules of Evidence, *Bourjaily v. U.S.*, 483 U.S. 171, 97 L.Ed.2d 144, 158 (1988).

"[T]here can be no separate Confrontation Clause challenge to the admission of a co-conspirator's out-of-court statement".

In a separate opinion the Supreme Court also rejected as a "radical proposition" the contention that co-conspirator declarations should not be admitted without demonstrating that the declarant is reasonably unavailable to testify and be cross-examined. *U.S. v. Inadi*, 475 U.S. 387, 394 (1986) [holding *Ohio v. Roberts*, 1448 U.S. 56 (1980) requirements of additional indicia of reliability, not applicable to co-conspirator's statements].

But most recently the court revisited the issue of an unavailable witness' statements and the Confrontation Clause. In *Crawford v. Washington*, 124 S.Ct. 1354 (2004), the court there found that out-of-court statements by witnesses that are testimonial are barred, under the Confrontation Clause, unless witnesses are unavailable and defendants had prior opportunity to cross-examine witnesses, regardless of whether such statements are deemed reliable by court. In the later case *Davis v. Washington*, 547 U.S. 813 (2006), the Supreme Court held that hearsay evidence elicited with an eye toward use in future criminal proceedings is testimonial.

Whether specific testimony will be held to be testimonial or not will depend of the type of testimony and the facts of a particular case. In *Michigan v. Bryant*, 131 S. Ct. 1143, the Court carved out an "ongoing emergency" exception to the basic principles of *Crawford*, holding the identification and description of a shooter and the location of the shooting were "not testimonial statements because they bore the 'primary purpose . . . [of enabling the] police assistance to meet an ongoing emergency.'" Therefore, their admission at Bryant's trial did not violate the

Confrontation Clause." In a strongly-worded dissent, Justice Antonin Scalia, author of the *Crawford and Melendez-Diaz* decisions, criticized the majority opinion for distorting "our confrontation clause jurisprudence and leav[ing] it in a shambles."

In *Melendez-Diaz v. Massachusetts*, 129 S.Ct. 2527 (2009), the Court found drug-testing reports to fall within *Crawford's* class of "testimonial" statements, and precluded the use of *ex parte* affidavits as a substitute for an actual representative of the laboratory. Faced with the follow-up question of "whether the Confrontation Clause permits the prosecution to introduce a forensic laboratory report containing a testimonial certification—made for the purpose of proving a particular fact—through the in-court testimony of a scientist who did not sign the certification or perform or observe the test reported in the certification," the Supreme Court in *Bullcoming v. New Mexico*, 131 S. Ct. 2705 (2011) reversed a recent New Mexico Supreme Court decision which permitted such a practice. In so holding, the Court placed heavy emphasis upon the certifying function of the lab tech who conducted the gas chromatography testing. While true that the lab tech plays the primary function of a scrivener in reading a gas chromatograph, his act of certifying the blood as untampered with and noting that the test followed strict protocols made his report markedly not mechanical and "meet for cross-examination." Were the Court to support the belief of the New Mexico Supreme Court, Justice Ginsberg noted, eye-witnesses who do nothing more than note that the traffic light was green at the time of the accident would fall beyond the purview of the Confrontation Clause. Highlighting the inadequacy of such a confrontation-by-proxy arrangement as that permitted by the New Mexico Court, Justice Ginsberg, citing the Supreme Court in *United States v. Gonzalez-Lopez*, reminded the Government that "if a 'particular guarantee' of the Sixth Amendment is violated, no substitute procedure can cure the violation, and '[n]o additional showing of prejudice is required to make the violation 'complete.''" The Court also rejected the notion that blood sample chromatographs and their certifying affidavits were not testimonial, highlighting the vast similarity between such a lab report and the drug testing reports deemed testimonial in *Melendez-Diaz*.

While Justice Sotomayor's concurrence agrees that the statement at issue was produced for the purposes creating an "out-of-court substitute for trial testimony" and was thus testimonial, she separately notes several other issues not presented by the present case which might make such a report of an individual's blood alcohol level non-testimonial. These include: medical records necessary for treatment; the testimony of an individual supervisor who witnessed the lab technician carrying out the test; the use of a certified expert who testified as to the content of a lab report not itself entered into evidence; or, lastly, an instance where only the gas chromatogram itself (the machine generated printout) found admission into evidence. The questions presented by this concurring opinion generate a new wave of doubt and mystery as to the fate of the Confrontation Clause.

For instance, the circuit court have has held that evidence falling within the business or public records exceptions, including autopsy reports, are not testimonial. *See: U.S. v. Feliz*, 467 F.3d 227 (2nd Cir. 2006) (autopsy report not testimonial); *U.S. v. Torres-Villalobos*, 487 F.3d 607 (8th Cir. 2007) (warrants of deportation are not testimonial); *U.S. v. Weiland*, 420 F.3d 1062 (9th Cir. 2005) (records of conviction and routine certifications of public records are not testimonial);

U.S. v. Lopez-Moreno, 420 F.3d 420 (5th Cir. 2005) (ICE computer records are public records and not testimonial); *U.S. v. Mendez*, 514 F.3d 1035 (10th Cir. 2008) (ICE database is not testimonial).

OTHER QUESTIONS OF ADMISSIBILITY UNDER RULE 104(a)

Rule 104(a) similarly vests in the trial court the responsibility to determine the admissibility of hearsay statements under one of the exceptions set out in Rule 803 or 804,

the voluntariness of confessions:

See Jackson v. Denno, 378 U.S. 368 (1964),

the application of the marital privilege:

See U.S. v. Pensinger, 549 F.2d 1150 (8th Cir. 1977),

the mental capacity of declarant of hearsay statements,

See Huff v. White Motor Corp., 609 F.2d 286, 291 (7th Cir. 1979);

Cf. U.S. v. Fowler, 605 F.2d 181 (5th Cir. 1979) (noting admissibility of pretrial identifications);

See generally 1 Weinstein's, Evidence, & 104[07], 104-52;

Cf. U.S. v. Peele, 574 F.2d 489 (9th Cir. 1978),

and hypnotically induced or enhanced testimony,

See U.S. v. Awkard, 597 F.2d 667 (9th Cir.), *cert. denied*, 444 U.S. 885 (1979).

RULES OF EVIDENCE NOT APPLICABLE

In making its determination as to admissibility under Rule 104(a), the court is not bound by the rules of evidence.

See Federal Rule of Evidence 104(a);
U.S. v. Killebrew, 594 F.2d 1103 (6th Cir.), *cert. denied*, 422 U.S. 933 (1979) [not error to admit hearsay at suppression hearing];
U.S. v. Lee, 541 F.2d 1145 (5th Cir. 1976);
U.S. v. Haldeman, 559 F.2d 31 (D.C. Cir. 1976);
U.S. v. Tussell, 441 F. Supp. 1092 (M.D. Pa. 1977);
U.S. v. Raddatz, 447 U.S. 667, 679, 100 S.Ct. 2406, 2414, 65 L.Ed.2d 424 (1980)[same].

See also In the Matter of the Search of 949 Erie Street, Racine, Wisconsin, 824 F.2d 538, 540 (7th Cir. 1987)[hearsay admissible at 41 (e) motion for return of seized property];

In the Matter of the Search of the Premises known as 6455 South Yosemite, Englewood Colorado, 897 F.2d 1549, 1552 (10th Cir. 1990)[hearsay admissible with respect to 41(e) motion which does not concern legality of the search].

RELEVANCY CONDITIONED ON FACT [FED. R. EVID. RULE 104(b)]

When the "relevancy" of evidence or testimony is conditioned on the fulfillment of a factual "condition precedent", there is no requirement of a prior determination by the court regarding its admissibility. Rather, such evidence may be admitted "subject to" the introduction of evidence sufficient to support a finding of the fulfillment of the condition. The requirement of identification or authentication of evidence is a form of relevancy conditioned upon a fact.

See *In re James Long Construction Co.*, 557 F.2d 1039 (4th Cir. 1977)[the genuineness of signatures under Rule 901];

U.S. v. Stearns, 550 F.2d 1167 (9th Cir. 1977) [photographs];

U.S. v. Levine, 546 F.2d 658, 668 (5th Cir. 1977).

"OTHER CRIMES" EVIDENCE [RULE 404(b)]

For example, the Supreme Court recently held that a trial court need not decide for itself whether an accused committed an extraneous offense under Rule 404(b) before admitting such "other crimes" or misconduct evidence. Instead, "such evidence should be admitted if there is sufficient evidence to support a finding by the jury that the defendant committed the similar act".

Huddleston v. U.S., 485 U.S. 681, 108 S.Ct. 1496, 99 L.Ed.2d 771 (1988).

The court held that unlike the required preliminary showing under Rule 104(a) for the admission of co-conspirator's statements, *see Bourjaily v. U.S.*, 483 U.S. 171, 97 L.Ed.2d 144 (1988), no such Rule 104(a) preliminary determination need be made at all prior to admitting "other crimes" evidence under Rule 404(b).

"We conclude that a preliminary finding by the court that the Government has proved the act by a preponderance of the evidence is not called for under Rule 104(a). This is not to say, however, that the Government may parade past the jury a litany of potentially prejudicial similar acts that have been established or connected to the defendant only by unsubstantiated innuendo. Evidence is admissible under Rule 404(b) only if it is relevant."

Procedurally, the Supreme Court placed its stamp of imprimatur upon an after-the-fact determination under Rule 104(b).

"In determining whether the Government has introduced sufficient evidence to meet Rule 404(b), the trial court neither weighs credibility nor makes a finding that the Government has proved the conditional fact by a preponderance of the evidence. The court simply examines all the evidence in the case and decides whether the jury could reasonably find the conditional fact ...by a preponderance of the evidence.... The trial court has traditionally exercised the broadest sort of discretion in controlling the order of proof at trial, and we see nothing in the Rules of Evidence that would change this practice. Often the trial court may decide to allow the proponent to introduce evidence concerning a similar act, and at a later point in the trial assess whether sufficient evidence has been offered to permit the jury to make the requisite finding. If the proponent has failed to meet this minimal standard of proof, the trial court must instruct the jury to disregard the evidence.

As if this were not a sufficient exercise in sophistry, the Court went on to note [quoting from *Bourjaily*]:

"We emphasize that in assessing the sufficiency of the evidence under Rule 104(b), the trial court must consider all evidence presented to the jury. '[I]ndividual pieces of evidence, insufficient in themselves to prove a point, may in accumulation prove it. The sum of an evidentiary presentation may well be greater than its constituent parts."

To console the citizen's understandable concern regarding this cavalier handling of such prejudicial evidence, the Court offered the following:

"We share petitioner's concern that unduly prejudicial evidence might be introduced under Rule 404(b).... We think, however, that the protection against such unfair prejudice emanates not from a requirement of a preliminary finding by the trial court, but rather from four other sources: first, from the requirement of Rule 404(b) that the evidence be offered for a proper purpose; second, from the relevancy requirement of Rule 402 - as enforced through Rule 104(b); third, from the assessment the trial court must make under Rule 403 to determine whether the probative value of the similar acts evidence is substantially outweighed by its potential for unfair prejudice... and fourth, from Federal Rule of Evidence 105, which provides that the trial court shall, upon request, instruct the jury that the similar acts evidence is to be considered only for the proper purpose for which it was admitted."

But see *George v. State*, 890 S.W.2d 73, 75 & 76 (Tex. Crim. App. 1994)[it has long been the law in Texas that the standard of proof necessary to admit extraneous offenses is beyond a reasonable doubt];

State v. Terrazas, 944 P.2d 1194 (Ariz. 1997) [en banc][we do not agree with the Preponderance of the evidence standard set forth in *Huddleston*, but hold that the standard to be applied to prior bad acts evidence is that set forth in *State v.*

Hughes, 426 P.2d 386 (Ariz. 1967), requiring proof by clear and convincing evidence].

HEARINGS OUT OF PRESENCE OF JURY [FED. R. EVID. RULE 104(c)]

Hearings on the admissibility of confessions "shall be conducted out of the hearing of the jury." FED. R. EVID. Rule 104(c); *Jackson v. Denno*, 378 U.S. 368 (1964).

Hearings on other preliminary matters must be held outside the presence of the jury when the interests of justice so require, *U.S. v. Fosher*, 568 F.2d 207 (1st Cir. 1978) [determination of admissibility of "mug shots" should be made at hearing out of presence of jury]; *U.S. v. Bear Killer*, 534 F.2d 1253 (8th Cir. 1976), *cert. denied*, 429 U.S. 846 [at the suppression hearing], or when an accused is a witness, if he so requests, Rule 104(c).

TESTIMONY BY THE ACCUSED FED. R. EVID. Rule 104(d)

In *Simmons v. U.S.*, 390 U.S. 377, 88 S.Ct. 967, L.Ed.2d 1247 (1968), the Supreme Court held:

"If a defendant testifies in support of a motion to suppress on Fourth Amendment grounds, his testimony is not admissible against him at trial over his objection."

The theory being that an accused should not be required to forfeit one constitutional right in order to exercise another. *See also U.S. v. Montos*, 421 F.2d 215, 220 n.2 (5th Cir.), *cert. denied*, 397 U.S. 1022 (1970). However, a defendant's pretrial testimony may become admissible for impeachment purposes where that defendant testifies inconsistently at trial thereafter.

Cf. Harris v. New York, 401 U.S. 222, 91 S.Ct. 643, 28 L.Ed.2d 1 (1971) [a statement obtained in violation of *Miranda* is admissible for impeachment];

Advisory Committee Notes, FED. R. EVID. Rule 104(d) [warning that the "rule does not address itself to questions of subsequent use of testimony given by an accused at a hearing on a preliminary matter"].

ADVISORY COMMITTEE'S NOTE RULE 104

In its report, the Senate Judiciary Committee noted that 104(d) was not a license to a defendant to gratuitously raise issues not necessary to the decision of the preliminary matter. It wrote:

"Rule 104(d). Preliminary Questions: Testimony by accused Under rule 104(c) the hearing on a preliminary matter may at times be conducted in front of the jury. Should an accused testify in such a hearing, waiving his privilege against self-

incrimination as to the preliminary issue, rule 104(d) provides that he will not generally be subject to cross-examination as to any other issue. This rule is not, however, intended to immunize the accused from cross-examination where, in testifying about a preliminary issue, he injects other issues into the hearing. If he could not be cross-examined about any issues gratuitously raised by him beyond the scope of the preliminary matters, injustice might result. Accordingly, in order to prevent any such unjust result, the committee intends the rule to be construed to provide that the accused may subject himself to cross-examination as to issues raised by his own testimony upon a preliminary matter before a jury. Report on Federal Rules of Evidence, No. 93-1277, 93rd Cong., 2d Session, Senate, at 24 (1974).

See also Hearings before Special Subcommittee on Reform of Federal Criminal Laws of Committee on the Judiciary, House of Representatives, 93rd Cong., 1st Sess., on Proposed Rules of Evidence at 121-122.

See also Federal Rule of Evidence 105(d) at 236.

As noted below, 104(d) was shortened by the Advisory Committee recognizing that this was a developing constitutional area, best left for case law. Counsel should caution the accused, who seeks to testify as to a preliminary matter, not to volunteer any more than is necessary.

Texas Rule 104(d) expressly provides that an accused does not by testifying upon a preliminary matter out of the hearing of the jury, become subject to cross-examination as to other issues in the case.

INSTRUCTIONS ON LIMITED ADMISSIBILITY FED. R. EVID. RULE 105

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

See *U.S. v. Washington*, 592 F.2d 680 (2d Cir. 1979)[error to refuse to give instruction limiting consideration of prior felony conviction, admitted for the purpose of impeachment];
U.S. v. Diaz, 585 F.2d 116 (5th Cir. 1978)[limiting instruction on prior conviction admitted pursuant to Rule 609 for impeachment];
U.S. v. Garcia, 530 F.2d 650 (5th Cir. 1976) [failure to limit consideration of prior inconsistent statement to impeachment was not "plain error", absent a request for such an instruction].

See also *U.S. v. Brown*, 562 F.2d 1144 (9th Cir. 1977);
U.S. v. Bridwell, 583 F.2d 1135 (10th Cir. 1978);

U.S. v. Albert, 595 F.2d 283 (5th Cir.), *cert. denied*, 444 U.S. 963 (1979) ["other crimes" evidence admitted under Rule 404(b) against co-defendants];
U.S. v. Ragghianti, 560 F.2d 1376 (9th Cir. 1977)[prior inconsistent statement used for impeachment purposes].

RULE OF COMPLETENESS

REMAINDERS OF OR RELATED WRITINGS OR RECORDED STATEMENTS ("RULE OF COMPLETENESS") [FED. R. EVID. RULE 106]

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

See U.S. v. Burns, 163 F.3d 840 (5th Cir. 2003) [holding that in addition to ensuring that court has adequate representation of declarant's statement, rule of completeness, which allows opponent against whom part of utterance has been put into evidence to put in remainder of utterance, guards against danger that out-of-context statement may create such prejudice that it is impossible to repair by subsequent presentation of additional material];

U.S. v. Branch, 91 F.3d 699 (5th Cir. 1996) [holding that the "rule of completeness," is to permit contemporaneous introduction of recorded statements that place in context other writings admitted into evidence which, viewed alone, may be misleading];

U.S. v. Bacon, 602 F.2d 1248 (7th Cir.), *cert. denied*, 444 U.S. 967 [the remainder of witness' statement supporting witness' testimony on direct is admissible after portions of the statement are used for impeachment on cross-examination by the defense];

U.S. v. Weisman, 624 F.2d 1118 (2d Cir.), *cert. denied*, 449 U.S. 871 (1980) [entitled to offer other portion of tapes only where same explain or rebut the matters contained in the offered portions or are "necessary to clarify or make not misleading that which is introduced"];

The court makes the determination as to what is "closely related". *U.S. v. Burreson*, 643 F.2d 1344 (9th Cir.), *cert. denied*, 454 U.S. 847 (1981). Thus the accused may be entitled to offer even otherwise inadmissible statements contained in related tape recordings under FED. R. EVID. Rule 106; *U.S. v. Sutton*, 801 F.2d 1346 (D.C. Cir. 1986) [it was error not to admit recorded conversations wherein Defendant made self-serving statements which were otherwise inadmissible hearsay under R. 106, same found, although "harmless error"].

The Rule's requirement that the related recording be admitted "at that time," may entitle a party to interrupt the other's side's presentation. *U.S. v. Maccini*, 721 F.2d 840 (1st Cir. 1983)

[permitting prosecutor to interrupt defense counsel's cross-examination of a witness to allow reading of prior testimony].

But see *U.S. v. Garrett*, 716 F. 2d 257 (5th Cir. 1983)[court excluded portion of tape recording offered by a defendant on grounds its prejudice outweighed any probative valued under Rule 403].

See also *U.S. v. LeFevour*, 798 F.2d 977 (7th Cir. 1986) [dicta relating to recorded statement of government informant offered by defendant to supplement his recorded conversation offered in its entirety by the government].

Likewise, when defense counsel uses a portion of a report or statement to impeach a witness he or she runs the risk that the court will admit the entire statement (which is generally prepared by government witnesses and agents for the purpose of burying Caesar, not to help him) under Rule 106.

See *U.S. v. Jamar*, 561 F.2d 1103, 1108-09 (4th Cir. 1977);
U.S. v. Baron, 602 F.2d 1248 (7th Cir.), *cert. denied*, 100 S.Ct. 456 (1979);
U.S. v. Rubin, 609 F.2d 51, 63 (9th Cir. 1979).

The rule is equally helpful to the defense. For example, it is error for a trial court to refuse a defendant the opportunity to play portions of a tape recording when it helped explain why he had knowledge of certain facts contained in a subsequent recorded conversation offered by the government. *U.S. v. Sweiss*, 800 F.2d 684 (7th Cir. 1986) [noting, however, accused waived any error by failing to explain theory under which such evidence was admissible]; *see also* FED. R. EVID. Rule 103(b); *U.S. v. Bacon*, 602 F.2d 1248 (7th Cir. 1979).

TEXAS RULE 106

The Texas "Rule of Completeness" is identical to the Federal Rule except that it expressly states that a [w]riting or recorded statement includes depositions. *See Roman v. State*, 503 SW.2d 252 (Tex.Cr.App. 1974) [prior "Rule of Completeness" doctrine in Texas].

TEXAS RULE 107

RULE OF OPTIONAL COMPLETENESS

Texas Rule 107 establishes that whenever a portion of an act, declaration, conversation, writing or recorded statement is offered by one party, the party against whom such statement is offered has a right to offer in evidence any other act, declaration, conversation, writing or recorded statement which is necessary to make the situation fully understood. Thus an adverse party who seeks to introduce the remainder of a matter encompassed by the rule need not interrupt his

adversary's case to introduce the same, but may rely on Rule 107 to introduce it at a later, more effective, time. Typically, this rule allows the admission of otherwise inadmissible evidence which the opponent has Aopened the door regarding. There is no corresponding rule in the Federal Rules of Evidence.

JUDICIAL NOTICE [FED. R. EVID. RULE 201]

Rule 201 governs judicial notice of facts relating to the case that are indisputable.¹ It does not include judicial notice of legal analysis or laws². The courts= acknowledgment of such matters emanates from statutory and case law authority. Courts may also acknowledge foreign law pursuant to Rule 26.1 of the Federal Rules of Criminal Procedure.³

Facts which may be acknowledged by the court include matters:

- (1) generally known within the territorial jurisdiction of the trial court,

See Gov. of Virgin Is. v. Gereau, 523 F.2d 140 (3d Cir.), *cert. denied*, 424 U.S. 917 (1976) [error for trial court to take judicial notice of his own extra record knowledge];
U.S. v. Anderson, 528 F.2d 590 (5th Cir.), *cert. denied*, 429 U.S. 837 (1976)[proper to take notice a federal correctional institution is within special territorial jurisdictions of U.S.].

See also U.S. v. Daly, 1999 WL 138895 (E.D.La.), [holding that a judicially noticed fact "must be one not subject to reasonable dispute in that it is either (1)[g]enerally known within the territorial jurisdiction of the trial court or (2)[c]apable of accurate and ready determination by resort to sources whose accuracy cannot be reasonably questioned." F.R.E. 201(b). Judicial notice of adjudicative facts dispenses with the need to present other evidence or for the fact finder to make findings as to those particular facts.]

- (2) capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned.

¹Referred to as Aadjudicative facts.

²Commonly referred to as legislative facts.

³A party who intends to raise an issue concerning the law of a foreign country shall give reasonable written notice. The court, in determining foreign law, may consider any relevant material or source, including testimony, whether or not submitted by a party or admissible under the Federal Rules of Evidence. The courts determination shall be treated as a ruling on a question of law. Rule 26.1, Federal Rules of Criminal Procedure.

See U.S. v. Solzmann, 417 F. Supp. 1139 (E.D. N.Y. 1976), *aff'd.*, 548 F.2d 395 (2d Cir. 1976) [notice taken of fact Israel had extradited individuals in past];
Harris v. U.S., 431 F. Supp. 1173 (E.D. Va. 1977) [notice taken of activities which constitute a pyramid scheme];
Commonwealth of Massachusetts v. Wescott, 431 U.S. 322, 97 S.Ct. 1755 (1977) [fishing license on file with Coast Guard];
U.S. v. Gould, 536 F.2d 216 (8th Cir. 1976) [notice that cocaine hydrochloride was a "Schedule II Controlled Substance" [derived from opium or coca leaves]];
U.S. v. Moreno, 579 F.2d 371 (5th Cir.), 99 S.Ct. 1217 (1979) [characteristics of border checkpoint previously held to be "functional equivalent of border];
Government of Canal Zone v. Burjan, 596 F.2d 690 (5th Cir. 1979) [government appropriately certified];
U.S. v. Hitsman, 604 F.2d 443 (5th Cir. 1979) [college transcript].

JUDICIAL RECORDS

See U.S. v. Halderman, 559 F.2d 31 (D.C. Cir.), *cert. denied*, 431 U.S. 933 (1977) [prior related hearing at which court had presided]; *Kinnett Dairies, Inc. v. Farrow*, 580 F.2d 1260 (5th Cir. 1978)[records in court's files from prior proceedings];
U.S. v. Hawkins, 566 F.2d 1006 (5th Cir.), *cert. denied*, 439 U.S. 848 (1978) [jury selection plan].

OFFICIAL RECORDS

Joseph v. United States Civil Service Comm'n, 554 F.2d 1140 (D.C. Cir. 1977) [election records].

OPPORTUNITY TO BE HEARD [FED. R. EVID. RULE 201(e)]

A party is entitled to an opportunity to be heard as to the propriety of taking judicial notice.

See Conway v. Chemical Leaman Tank Lines, Inc., 610 F.2d 360 (5th Cir. 1980) [as to such notice on appeal].

INSTRUCTING THE JURY REGARDING JUDICIAL NOTICE [FED. R. EVID. RULE 201(g)]

While the court instructs the jury to accept as conclusive any fact judicially noticed in a civil action, "In a criminal case, the court shall instruct the jury that it may, but is not required to, accept as conclusive any fact judicially noticed". *U.S. v. Anderson*, 528 F.2d 590 (5th Cir. 1976), *cert. denied*, 425 U.S. 837 ["you may and are allowed to accept as fact proven before you just as

though there had been evidence to that effect before you" not reversible error because not "require" jury to accept same]; *U.S. v. Jones*, 580 F.2d 219 (6th Cir. 1978) [after jury trial appellate court cannot take judicial notice, since jury would have been entitled to disregard same]; *Government of Canal Zone v. Burjan*, 596 F.2d 690 (5th Cir. 1979) [different result where criminal trial was before the court].

RELEVANCY AND ITS LIMITS [FED. R. EVID. RULE 401]

Where the evidence offered at trial fails to make "any fact material to the indictment 'more or less probable than it would be without the evidence,'" same is not relevant, and thus, inadmissible over objection. *U.S. v. Ferreira*, 821 F.2d 1, 6 (1st Cir. 1987) [quoting FED. R. EVID. 401, and holding fact that defendant possessed two loaded guns at time of arrest is irrelevant where charge was for unarmed bank robbery].

THE "OVERRIDE" RULE

EXCLUSION OF RELEVANT EVIDENCE ON GROUNDS OF PREJUDICE, CONFUSION OR WASTE OF TIME [FED. R. EVID. RULE 403]

Even if evidence is relevant or would be relevant under some other provision of the rules, it may be excluded where the trial court determines its probative value is "substantially outweighed" by the danger of unfair prejudice, confusion of the issues, misleading the jury or by considerations of undue delay, waste of time or needless presentation of cumulative evidence.

See U.S. v. Reynolds, 268 F.3d 572 (8th Cir. 2001)[fact that government witness had syringes in car when arrested was only marginally relevant to show motive or to impeach credibility and was unfairly prejudicial to the prosecution];

U.S. v. Kasouris, 474 F.2d 689 (5th Cir. 1973) [evidence of prior extortion attempt had greater prejudicial effect than probative value];

U.S. v. Jones, 570 F.2d 765 (8th Cir. 1978) [evidence against physician of some 478 other prescriptions without any limiting instruction or proof of doctor's treatment of patients in those instances was prejudicial]; *U.S. v. Stirling*, 571 F.2d 708 (2d Cir.), *cert. denied*, 439 U.S. 824 (1978) [the impact of judges as witnesses, especially in testifying as to "normalcy" of certain practices];

U.S. v. Lyles, 593 F.2d 182 (2d Cir.), *cert. denied*, 440 U.S. 972 (1979) [evidence of second drug transaction inadmissible through tape recordings of co-conspirator and third party];

U.S. v. Aims Back, 588 F.2d 1283 (9th Cir. 1979) [evidence of subsequent rape of witness inadmissible, especially without a specific limiting instruction];

U.S. v. Dolliole, 597 F.2d 102 (7th Cir.), *cert. denied*, 442 U.S. 946 (1979) [reliability of "prior crimes" evidence and government's "need" for such evidence are factors to be weighed];

U.S. v. Hendrix, 549 F.2d 1225 (9th Cir. 1977);

U.S. v. Robinson, 560 F.2d 507 (2d Cir.), *cert. denied*, 435 U.S. 905 (1978) [firearm not shown to jury even though testimony regarding same admitted];
U.S. v. Williams, 561 F.2d 859 (D.C. Cir. 1977) [error to admit testimony that money stolen from bank was found in apartment shared by defendant's sister];
U.S. v. Turquitt, 557 F.2d 464 (5th Cir. 1977) [error to admit for purposes of handwriting exemplar a lease signed by defendant under a false name];
U.S. v. Green, 548 F.2d 1261 (6th Cir. 1977) [error to admit physical effects of usage of controlled substance];
U.S. v. Benveniste, 564 F.2d 335 (9th Cir. 1977) [government allowed expert testimony regarding predisposition while defendant precluded opportunity to call his psychiatrist to testify defendant not predisposed, for fear same would confuse the jury].

The trial court must perform its "balancing" analysis and state its reasoning on the record. *U.S. v. Long*, 574 F.2d 761 (3d Cir. 1976). For example, evidence that an informant's testimony had led to over 100 other convictions was too prejudicial to admit in evidence. Moreover, its unfairly prejudicial effect far outweighed its probative value, under Rule 403, as to render it inadmissible for purposes of rebutting the defense of entrapment. Certainly, the evidence was relevant. Because the informant had been believed by a large number of other jurors, this made the defendant's claim he had been entrapped less likely. Nevertheless, under the balancing test contained in Rule 403 the admission of the evidence was plain error, given its unfairly prejudicial nature. *U.S. v. Sorando*, 845 F.2d 945 (11th Cir. 1988). *See also U.S. v. Cosentino*, 844 F.2d 30 (2d Cir. 1988)[a written cooperation agreement, extrinsic evidence, was held inadmissible for the "other purpose" of rehabilitation of a witness whose credibility was attacked during the opening statement].

CHARACTER EVIDENCE NOT ADMISSIBLE TO PROVE CONDUCT [FED. R. EVID. RULE 404]

Exceptions:

Character Evidence Generally.

Evidence of a person's character or a particular character trait is not admissible to prove that person acted in conformity therewith on a particular occasion, *except*:

Character of Accused [FED. R. EVID. Rule 404(a)(1)].

Evidence of a particular trait of an accused:

Offered by Accused.

U.S. v. Jackson, 588 F.2d 1046 (5th Cir.), *cert. denied*, 442 U.S. 941 (1979) [stating that truthfulness must be at issue];
U.S. v. Davis, 546 F.2d 583 (5th Cir.), *cert. denied*, 431 U.S. 906 (1977)[the defendant charged with escape not entitled to show sound record at penitentiary];
U.S. v. Sullivan, 803 F.2d 87 (C.A. Pa. 1986) [directing defendant to call nonjudicial character witnesses first, then excluding character testimony of ten judges did not deny defendant due process].

Offered by Prosecution to Rebut Same.

U.S. v. Wiley, 534 F.2d 659 (6th Cir.), *cert. denied*, 425 U.S. 995 (1976) [prosecution cannot put in evidence of bad character unless defendant first puts on good character evidence -- and even then, evidence of specific instances is inadmissible];
U.S. v. Corey, 566 F.2d 429 (2d Cir. 1977);
U.S. v. Giese, 597 F.2d 1170 (9th Cir. 1979) [portions of revolutionary treatise named and read by defendant];
U.S. v. Gilliland, 586 F.2d 1384 (10th Cir. 1978) [prosecution cannot put on bad character testimony through defense fact witnesses who do not testify as to character];
U.S. v. Yarns, 811 F.2d 454 (8th Cir. 1987)[evidence that defendant was a "good liar" admissible as both an admission by party opponent and as relevant to defendant's veracity].

Character of Victim [FED. R. EVID. Rule 404(a)(2)]

Evidence of a pertinent character trait of the victim of the crime offered by an accused or by the prosecution to rebut same, or evidence of a character trait of peacefulness of the victim offered by the prosecution in a homicide prosecution to rebut evidence the victim was the first aggressor. *U.S. v. Kelley*, 545 F.2d 619 (8th Cir.), *cert. denied*, 430 U.S. 933 (1977); *Government of Virgin Islands v. Solis*, 475 F. Supp. 542 (D.Vir.Is. 1979).

Character of Witness [FED. R. EVID. Rule 404(a)(3)]

Evidence of the character of a witness may be proved where admissible pursuant to Federal Rule of Evidence Rule 607, 608 and 609.

OTHER CRIMES, WRONGS, OR ACTS [FED. R. EVID. RULE 404(b)]

Evidence of other crimes, wrongs or acts is not admissible to prove the character of a person in order to show that he acted in 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. Even if an extraneous offense fits within Rule 404(b)'s exception it may be excluded as any other relevant evidence might be, where the trial court determines that unfair prejudice from such evidence substantially outweighs its probative value under Federal Rule of Evidence 403. *U.S. v. Santisteban*, 833 F.2d 513 (5th Cir. 1987); *U.S. v. Fortenberry*, 860 F.2d

628 (5th Cir. 1988)[The government's inability to articulate the probative value of the evidence, as well as the weakness of the evidence linking Fortenberry to the extrinsic offenses, warrants the conclusion that the primary impact of the evidence on the proceedings was to increase the prejudice against Fortenberry].

Motive:

U.S. v. Johnson, 525 F.2d 999 (2d Cir.), *cert. denied*, 424 U.S. 920 (1976) [drug abuse relevant to show defendant robbed bank in order to pay off drug contact];

U.S. v. Johnson, 528 F.2d 926 (5th Cir.), *cert. denied*, 426 U.S. 951 (1976) [prior felony record admissible to show defendant's motives in resisting arrest where he was carrying a firearm at time [constituting felon in possession]]; *Cantrell v. U.S.*, 323 F.2d 613 (D.C. Cir. 1963).

Although evidence of a defendant's financial condition may be admitted to show motive in a prosecution for crimes such as larceny or embezzlement, a trial court should be extremely cautious in admitting such evidence. The government must have more than a mere conjecture that impecuniosities was a motive, lest a poor defendant be subject to greater suspicion of having committed a crime, even a theft offense, because of the very fact of his poverty. Accordingly, the district court in an embezzlement prosecution remanded for a new trial instructing the court to consider with care whether to admit into evidence the details of defendant's financial condition. *U.S. v. Zipkin*, 729 F.2d 384 (6th Cir. 1984).

Note, another example of weighing unfair prejudice with probative value. *U.S. v. Simon*, 839 F.2d 1461 (11th Cir. 1988).

"[The defendants]... maintain that the district court committed reversible error in admitting testimony that each [defendant] worked at [an oil and gas company]. This testimony contains evidence suggesting that some of the [defendants] were instrumental in accomplishing a fraud on the customers of the former companies. The government however, did not argue that [these defendants] had the requisite intent to characterize their actions [at the oil company] as criminal. The government claims it sought to introduce evidence of the [defendants'] 'prior acts,' i.e. their mere participation, *however innocent* [sic], in the scheme at U.S. Oil."

"Before a district court can admit evidence of [a defendants'] prior acts, the prosecution must convince the court that 1) there was a proper purpose for introducing the evidence, 2) the [defendants] actually did the prior acts and [sic], 3) the probative value of introducing the evidence outweighs any prejudicial effect the evidence might have. The propriety of the lower court in admitting this evidence turns on the purpose for which the 'prior acts' were introduced. The appellants contend that the government introduced their participation in the US Oil

scheme simply to show that they 'acted in conformity therewith' at Alaska Oil. Rule 404(b) of the Federal Rules of Evidence makes clear that a court cannot admit evidence of a prior act to show that the defendant acted similarly. The government, on the other hand, contends that the prior act evidence introduced at trial merely showed that the appellants knew of the government investigation of U.S. Oil and of the indictment of several employees at the company. Thus, the government argues, the Court properly admitted evidence of the [defendants'] prior acts to help establish the present crime. Evidence that the [defendants] knew of the government's investigation and subsequent indictment of employees for fraud at U.S. Oil is certainly relevant since the evidence helps to determine whether appellants had the requisite intent to defraud in the instant case." *U.S. v. Simon*, 839 F.2d 1461 (11th Cir. 1988) [emphasis added/citations omitted].

Therein, lies the danger created by *Huddleston* regardless of remaining safeguards. A more practical and honest approach is suggested by the Court of Appeals for the District of Columbia. *Thompson v. U.S.*, 546 A.2d 414, (D.C.App.1988). The court found that an examination of four issues regarding the admissibility of 'prior acts' to show intent, as opposed to propensity to act in conformity therewith, "is helpful in resolving whether other crimes should be admitted."

"These issues are:

- (1) whether, and to what degree, intent as an issue can be distinguished from predisposition to commit the crime;
- (2) whether intent is a genuine, material and important issue, rather than a merely formal one;
- (3) whether the trial judge made his decision whether or not to admit that evidence at an appropriate time, when information as to all pertinent factors was available, and
- (4) whether the trial judge's instructions to the jury could and did resolve any issue of prejudice."

Intent:

U.S. v. Gonzalez-Lira, 936 F.2d 184 (5th Cir. 1991) [holding that evidence of prior marijuana smuggling attempt involving tractor trailer owned by defendant was admissible in prosecution for possession of marijuana with intent to distribute to show that defendant knew that marijuana was smuggled across the border in tractor trailer rigs, and that it had previously been smuggled in his own tractor trailer];

U.S. v. Namer, 835 F.2d 684 (5th Cir. 1988) [although improper, prosecutor's references to the defendant's acquittal for other incidents as evidence of intent was harmless error];

U.S. v. Bloom, 538 F.2d 704 (5th Cir.), *cert. denied*, 429 U.S. 1074 (1977) [evidence of trafficking in other drugs admissible at trial for possession of heroin with intent to distribute];

U.S. v. Hearst, 563 F.2d 1331 (9th Cir.), *cert. denied*, 435 U.S. 1000 (1978);

U.S. v. Beechum, 582 F.2d 898 (5th Cir.), *cert. denied*, 440 U.S. 920 (1979).

In *Beechum*, the en banc Fifth Circuit overruled *U.S. v. Broadway*, 477 F.2d 991 (5th Cir. 1973), holding that where "other crimes" evidence is offered on the issue of intent, there is no longer any requirement that the "physical elements" of the offenses be "identical". Rather under Rule 404(b), the Fifth Circuit has held there is now a two-step analysis, requiring that:

Relevancy:

The evidence of the "extrinsic offense", is "relevant" to an issue other than the defendant's character, and is offered as to the issue of "intent", then all that need be established is that the "extrinsic offense" requires the same "intent" as the crime charged. The reasoning being that such evidence makes it less likely the defendant engaged in the charged conduct with "lawful intent".

For example, in a prosecution for conspiracy to possess cocaine with intent to distribute, the district court erred by admitting defendant's statement that he had once flown a DC-3 airplane to Colombia and back, since there was nothing to indicate that defendant's intent in making the trip to Colombia was the same as his intent in committing the charged offense. Extrinsic act evidence is relevant to a defendant's intent to commit the charged crime only if the extrinsic act and the charged offense require the same intent. *U.S. v. Chilcote*, 724 F.2d 1498 (11th Cir. 1984).

Balancing Test.

Applying the balancing test of FED. R. EVID. Rule 403, the probative value is not substantially outweighed by the danger of prejudice. The *Beechum* court expressly recognizes that the "probative value" would be slight where intent could be established by:

- (1) other evidence,
- (2) stipulations,
- (3) inferences, or
- (4) is not contested by the defendant.

Moreover, the government must prove that the defendant committed the "other crimes" by a preponderance of the evidence. *See U.S. v. Huddleston*, 811 F.2d 974 (6th Cir. 1987) [the court reasoned that use of the "clear and convincing evidence" standard was too stringent in this context].

Plan:

U.S. v. Thompson, 503 F.2d 1096 (5th Cir. 1974).

Cf. *U.S. v. Goodwin*, 492 F.2d 1142, 1153 (5th Cir. 1976) ["when the prosecution seeks to prove design or plan by the doing of similar acts, more is required than the mere similarity that may suffice for showing intent"];

Ali v. U.S., 520 A.2d 306 (D.C. App. 1987) [in prosecution for sex offense, evidence that defendant abused complainant's younger sister is inadmissible to prove common acts of misconduct are not inherently relevant to a common scheme or plan];

U.S. v. Everett, 825 F.2d 658, 660 (2d Cir. 1987) [bank teller's testimony satisfied the requirement that corroboration is "direct and the matter corroborated is significant"].

Knowledge.

See *U.S. v. Quade*, 563 F.2d 375 (8th Cir. 1977);

U.S. v. Brown, 562 F.2d 1144 (9th Cir. 1977)[even as to dismissed counts of indictment];

U.S. v. Wilson, 536 F.2d 883 (9th Cir. 1976), *cert. denied*, 429 U.S. 982 [defendant's denial of familiarity with cohort's disposition to commit crime makes relevant evidence of his knowledge of their criminal past [eq. previous prison sentences]]];

U.S. v. Neary, 733 F.2d 210 (2d Cir. 1984)[in prosecution of restaurant owner charged with committing arson in order to collect his insurance proceeds, the Second Circuit held that the trial court committed reversible error in admitting evidence of three prior fines on defendant's property where he received insurance money as a result without any other evidence of wrongdoing [Trial Court's ruling was held to be in contravention of Rule 403]].

Identity.

See *U.S. v. Park*, 525 F.2d 1279 (5th Cir. 1976)[crime was too dissimilar to admit as proof of identity as identity exception is narrow];

U.S. v. Silva, 580 F.2d 144 (5th Cir. 1978) [reversible error to admit drug negotiations after sale in which defendant was charged, since defendant's sole defense was mistaken identity, intent was not a material issue, and the "other crime" was not so distinctive that it would be relevant to identity as the handiwork of defendant].

Absence of Mistake or Accident.

See *U.S. v. Hogue*, 827 F.2d 660 (10th Cir. 1987) [evidence of defendant's dissimilar prior violent conduct toward another victim only goes to prove acts that are in conformity therewith and as such are inadmissible to prove absence of mistake or accident].

See also *U.S. v. Beasley*, 809 F.2d 1273 (7th Cir. 1987) [in prosecution for possession with intent to distribute dilaudid, evidence tending to show that the defendant dealt in the kinds of drugs from the same source was inadmissible to show a "pattern" because mere temporal similarities were insufficient to show "identity, intent, plan, absence of mistake or one of the other listed grounds"];

Flight.

See *U.S. v. Alonzo*, 571 F.2d 1384 (5th Cir. 1978)[while evidence of flight may be insufficient without more to support a conviction, same is still relevant to guilt];
U.S. v. Thunder, 604 F.2d 550 (8th Cir. 1979);
U.S. v. Tille, 729 F.2d 615 (9th Cir. 1984) [attempted flight at the time of arrest was admissible to permit an inference of knowledge].

Rebut a Defensive Theory.

See *U.S. v. Cook*, 538 F.2d 1000 (3d Cir. 1976) [reversible error to admit sodomy conviction at armed robbery trial where defense counsel on cross of arresting officer merely elicited testimony that possession of firearm was not illegal];
U.S. v. Riggins, 539 F.2d 682 (9th Cir. 1976);
Lovely v. U.S., 169 F.2d 386 (4th Cir. 1948)[in rape prosecution where consent is at issue, similar extraneous offense committed by defendant against another woman without her consent is not admissible on that issue];

Predisposition.

See *U.S. v. Boyd*, 595 F.2d 120 (2d Cir. 1978) [*subsequent* acts not admissible to show predisposition];
U.S. v. Bramble, 641 F.2d 681 (9th Cir. 1981) [prior possession of marijuana plants not relevant to show predisposition to sell cocaine]; *U.S. v. Mejias*, 552 F.2d 435 (9th Cir. 1984) [in prosecution for conspiracy to possess cocaine the court ruled that an unsolicited request to sell marijuana had a direct bearing upon defendants predisposition and intent to sell cocaine. The fact that the marijuana evidence arose from the same transaction as the charged crime added to its probative value and lessened its prejudicial effect].

See also *U.S. v. Cosentino*, 844 F.2d 30 (2d Cir. 1988) [extended use of extrinsic evidence, prohibited under rule 608(b); in the form of a written cooperation agreement held admissible for the "other purpose" of rehabilitation offered during direct examination in response to an attack on credibility in the opening statement];

U.S. v. Beasley, 809 F.2d 1273 (7th Cir. 1987) [in prosecution for possession with intent to distribute dilaudid, evidence tending to show that defendant dealt in other kinds of drugs prescribed by the same doctor was inadmissible to show a "pattern because mere temporal similarities were insufficient to show "identity, intent, plan, absence of mistake or one of the other listed grounds];

U.S. v. Gomez, 810 F.2d 947 (10th Cir. 1987)[conduct related to the conduct charged in the superseding indictment is inadmissible as "other crimes" evidence under 404(b)].

Order of Proof.

See *U.S. v. Juarez*, 561 F.2d 65 (7th Cir. 1977) [knowledge and intent are always material issues in narcotics prosecutions [especially where defense made no effort to preclude same] no error in allowing government to introduce evidence of prior sales during case-in-chief];

U.S. v. Halper, 590 F.2d 422 (2d Cir. 1978) [introduction of such evidence should normally await the conclusion of the defendant's case and not be offered during government's case-in-chief].

Removing Issue.

See *U.S. v. Roberts*, 619 F.2d 379, 383 n.2 (5th Cir. 1980)[the defendant may "affirmatively take issue of intent (identity or other issues) out of case" by making an appropriate stipulation "to avoid the introduction of extrinsic offense evidence"];

U.S. v. Mobel, 604 F.2d 748 (2d Cir. 1979);

U.S. v. King, 616 F.2d 1034, *cert. denied*, 446 U.S. 969 (8th Cir. 1980).

PRIOR NOTICE OF "OTHER CRIMES" EVIDENCE

Rule 404(b) includes a requirement that the prosecution, upon request of the defendant, provide "reasonable notice in advance of trial" of its intent to use 404(b) evidence in its case-in-chief. It is therefore important for defense attorneys to file such a request as a standard part of pretrial motions or discovery letters, as early as possible in the case. It should also be noted that this provision *is not* reciprocal. Thus, if the defense intends to introduce evidence of the "other

crimes, wrongs, or acts" of a government witness or the agents involved in the case, notice of same need not be provided to the prosecution even upon timely request.

METHODS OF PROVING CHARACTER [FED. R. EVID. Rule 405]

Reputation or Opinion.

In all cases in which evidence of character or a trait of character of a person is admissible, proof may be made by testimony as to reputation or by testimony in the form of an opinion. On cross-examination, inquiry is allowable into relevant specific instances of conduct. FED. R. EVID. Rule 405(a); *Gov. of Virgin Islands v. Peterson*, 553 F.2d 324 (3d Cir. 1977)[evidence that defendant belonged to pacifist church not admissible to show character trait of non-violence]. *See also* FED. R. EVID. Rule 610[forbidding evidence of religious beliefs to impair or enhance that witnesses credibility].

Specific Instances of Conduct.

In cases in which character or a trait of character of a person is an essential element of a charge, claim, or defense, proof may also be made of specific instances of his conduct. FED. R. EVID. Rule 405(b); *U.S. v. Pantone*, 609 F.2d 675, 4 Fed. Evid. Rep. 1262 (3d Cir. 1979) [Rule 405 forbids use of specific instances of conduct to prove character unless character is an essential element of offense charge].

PROOF OF CHARACTER [FED. R. EVID. RULES 405(a) AND 608(a)]

Character may now be proved either by reputation *or* opinion testimony. Rules 405(a) [dealing with reputation or opinion as to character or trait of character generally] and 608(a) [dealing with reputation or opinion as to credibility], Federal Rules of Evidence. And the Courts have recently recognized a significant difference in the predicate required to prove character through opinion testimony as opposed to reputation.

See generally Leonard, *The Use of Character to Prove Conduct: Rationality and Catharsis in the Law of Evidence*, 58 U.COL.L.REV. 1 (Winter 1986-87).

BY REPUTATION TESTIMONY

Reputation testimony is by definition hearsay and a reputation witness "must have sufficient acquaintance with the principal witness and his community in order to ensure that the testimony adequately reflects the *community's* assessment." *U.S. v. Watson*, 669 F.2d 1374, 1381-

82 (11th Cir. 1982) [some 2-3 month acquaintance with witness is insufficient even though the witness "lived in ...the location ...thirty-three years" and "worked with [witness] every day"]; *Michelson v. U.S.*, 335 U.S. 469, 478 (1948); *U.S. v. Augello*, 452 F.2d 1135, 1139-40 (2d Cir. 1971), *cert. denied*, 406 U.S. 922 (1972); *U.S. v. Oliver*, 492 F.2d 943 (8th Cir. 1974) [allowing reputation testimony based upon a short period of acquaintance].

"A proper foundation must be laid before the admission of reputation testimony. The reputation witness must be qualified through a showing of 'such acquaintance with the [person], the community in which he lived and the circles in which he has moved, as to speak with authority of the terms in which generally he is regarded.'" *Michelson v. U.S.*, 335 U.S. 469, 478, 69 S.Ct. 213 (1948).

See also *Arocha v. State*, 495 SW.2d 958 (Tex.Cr.App. 1973) [community is not limited to the locale where the case is tried nor defendant's residence at the date the offense was committed].

And the trial court's determination regarding the adequacy of the foundation for a reputation witness is ordinarily not overturned on appeal, *Michelson v. U.S.*, 335 U.S. 469, 480-81 (1948); without demonstrating an abuse of discretion. *U.S. v. Watson*, 669 F.2d 1374, 1381 (11th Cir. 1982).

BY OPINION TESTIMONY

Historically, reputation evidence was the exclusive method for proving character. Opinion evidence was excluded. 3 WEINSTEINS, EVIDENCE & 608[04], at 608-20 (1978); *See generally* MCCORMICK, EVIDENCE ' 44 at 95 (1954); WIGMORE, EVIDENCE ' ' 1981-86 (3d ed. 1940).

However, the enactment of Rule 608(a) of the Federal Rules of Evidence in 1976 substantially enlarged the avenues by which one may prove character, by providing that the credibility of a witness may be attacked "by evidence in the form of opinion or reputation". FED. R. EVID. Rule 608(a); *U.S. v. Lollar*, 606 F.2d 587, 589 (5th Cir. 1979).

Under new FED. R. EVID. Rule 608(a), no foundation regarding length of acquaintance or recent information such as that required for reputation testimony is required for opinion testimony, *U.S. v. Lollar*, 606 F.2d 587 (5th Cir. 1979); *U.S. v. Watson*, 669 F.2d 1374, 1382 (11th Cir. 1982); and such "opinion" testimony may be based upon isolated instances of conduct, or personal feelings by the witness. *U.S. v. Watson*, 669 F.2d 1374, 1382 (11th Cir. 1982).

"The Fifth Circuit determined that prior questioning of the opinion witness regarding his knowledge of the defendant's reputation was unnecessary. 'The rule imposes no prerequisite condition upon long acquaintance or recent information about the witness; cross-examination can be expected to expose defects of lack of familiarity and to reveal reliance on isolated or irrelevant instances of misconduct or the existence of feelings of personal hostility towards the principle witness.'" *U.S. v. Watson*, 669 F.2d 1374, 1382 (11th Cir. 1982).

See also *U.S. v. Townsend*, 31 F.3d 262 (5th Cir. 1994) [Rule 608(b) providing that a witness may be questioned about specific instances of conduct to attack the witness reputation for truthfulness] at 268. *U.S. v. Lollar*, 606 F.2d 587, 589 (5th Cir. 1979).

This distinction between the foundations required for reputation as opposed to opinion testimony "follows from an analysis of the nature of the evidence involved". *U.S. v. Watson*, 669 F.2d 1374, 1382 (11th Cir. 1982).

Reputation testimony is based upon the community's assessment of the witness' character, whereas opinion testimony relates to "the witness' own impression of an individual's character". Accordingly, opinion testimony relating to character may be based upon even isolated instances which "cross-examination can be expected to expose". *U.S. v. Lollar*, 606 F.2d 587, 589 (5th Cir. 1979).

"The reputation witness must have sufficient acquaintance with the principle witness and his community in order to ensure that the testimony adequately reflects the community's assessment.... In contrast, opinion testimony is a personal assessment of character. The opinion witness is not relating community feelings, the testimony is solely the impeachment witness' own impression of an individual's character for truthfulness. Hence, a foundation of long acquaintance is not required for opinion testimony. Of course, the opinion witness must testify from personal knowledge.... But once that basis is established the witness should be allowed to state his opinion, cross-examination can be expected to expose defects." *U.S. v. Watson*, 669 F.2d 1574, 1582 (11th Cir. 1982).

But see

U.S. v. Dotson, 799 F.2d 189 (5th Cir. 1986) [opinion testimony by an investigating officer as to truthfulness of a party cannot be based solely on information gathered by the investigating officers].

In essence, the litany of arcane reputation questions mastered by almost every third year law student and lost by just as many jurors need not be asked with respect to proof of character by opinion testimony.

"While it may be more desirable to have counsel first ask the impeaching witness about his knowledge of the defendant's reputation for truth and veracity, and whether based on that knowledge he would believe the defendant under oath. Rule 608(a) imposes no such requirement.

Witnesses may now be asked directly to state their opinion of the principle witness' character for truthfulness and they may answer for example, "I think X is a liar". The rule imposes no prerequisite conditioned upon long acquaintance or recent information about the witness; cross-examination can be expected to expose defects of lack of familiarity and to reveal reliance on isolated or irrelevant

instances of misconduct or the existence of feelings or personal hostility towards the principal witness." (emphasis added) *U.S. v. Lollar*, 606 F.2d 587, 589 (5th Cir. 1979).

HABIT: ROUTINE PRACTICE FED. R. EVID. RULE 406

Evidence of the habit of a person or of the routine practices of an organization, whether corroborated or not and regardless of the presence of eyewitnesses, is relevant to prove that the conduct of the person or organization on a particular occasion was in conformity with the habit or routine practice. *Reyes v. Missouri Pacific R. Co.*, 589 F.2d 791 (5th Cir. 1979) [intemperance of defendant not raised to level of habit or routine (four prior convictions for public intoxication spanning three and one-half year period)]; *U.S. v. Petsas*, 592 F.2d 525 (9th Cir.), *cert. denied*, 442 U.S. 910 (1979) [defendant's contention that he routinely acted honestly is matter of character evidence as to same not, habit or routine under Rule 406 which would allow him to prove conduct on a particular occasion was in conformity with same].

See *U.S. v. West*, 22 F.3d 586, 592 (5th Cir. 1996) [*finding that "Rule 406, on its face, applies in only two instances: (1) to show that an individual acted in conformity with his or her habit, and (2) to show that an organization acted in conformity with its routine practice."*]

LIMITATION ON CROSS-EXAMINATION OF CHARACTER WITNESS

In *U.S. v. Candelaria-Gonzalez*, 547 F.2d 291, 294 (5th Cir. 1977), the Fifth Circuit Court held it was reversible error to permit a prosecutor to inquire of a defense character witness whether his opinion would be affected by the defendants "indictment", at p. 293, by the offense on trial or by what "a DEA Agent testified" to as same "struck at the very heart of the presumption of innocence which is fundamental to Anglo-Saxon concepts of 'fair trial.'" *U.S. v. Candelaria-Gonzalez*, 547 F.2d at 294. One cannot so elevate Government witness' testimony "to the status of accepted fact" as "the presumption of innocence [is] destroyed in the process." *Id.* at 295.

COMPROMISE AND OFFERS TO COMPROMISE RULE 408 AND THE 2006 UPDATES

Effective December 1, 2006, Federal Rule of Evidence 408 Compromise and Offers to Compromise will be amended. The rule is being changed, as the Committee Notes explain, to settle some questions in the courts about the scope of the Rule, and to make it easier to read. A few of the changes include:

First, the amendment provides that Rule 408 does not prohibit the introduction in a criminal case of statements or conduct during compromise negotiations regarding a civil dispute by a government

regulatory, investigative, or enforcement agency. *See, e.g., United States v. Prewitt*, 34 F.3d 436, 439(7 th Cir. 1994).

Statements made in compromise negotiations of a claim by a government agency may be excluded in criminal cases where the circumstances so warrant under Rule 403.

In contrast, statements made during compromise negotiations of other disputed claims are not admissible in subsequent criminal litigation, when offered to prove liability for, invalidity of, or amount of those claims.

The amendment prohibits the use of statements made in settlement negotiations when offered to impeach by prior inconsistent statement or through contradiction.

The amendment makes clear that Rule 408 excludes compromise evidence even when a party seeks to admit its own settlement offer or statements made in settlement negotiations.

In criminal cases, the concern is that statements of fault made during civil negotiations can be used in a subsequent criminal trial. Part of the success of settlements is that the current Rule 408 assured parties that anything they said could not be subsequently used against them.

PRIVILEGES

GENERAL RULE [FED. R. EVID. RULE 501]

Except as otherwise required by the Constitution of the United States or provided by Act of Congress privileges shall be governed by the principles of the common law as they may be interpreted by the courts of the United States in the light of reason and experience. *See Trammel v. U.S.*, 445 U.S. 40, 100 S.Ct. 906 (1910) [inter-spousal privilege is that of witness spouse who may neither be compelled to testify nor foreclosed from testifying]; *see also Buchanan v. Kentucky*, 483 U.S. 402, 107 S.Ct. 2906, 97 L.Ed.2d 336 (1987) [the privilege against self incrimination was not violated when the State, in a murder trial, offered for rebuttal purpose part of a psychiatric report about the defendant as the defendant has both requested that examination and had presented a defense of "extreme emotional disturbance"]; *Schneider v. Lynaugh*, 835 F2d.570 (5th Cir. 1988) [requested psychiatric examination is admissible and does not violated Fifth Amendment privilege against self-incrimination].

But see Park v. Montana 6th Judicial Dist. Court, Park, Cty., 961 P.2d 1267 (Mont. June 25, 1998).

In *Park*, the Court disagreed that *Buchanan* stands for the idea that a defendant who has raised his mental state as an issue waives his Fifth Amendment privilege for all purposes. He

can decide with whom and in what terms he discusses such potentially incriminating matters as the events surrounding the charges against him.

PHYSICIAN-PATIENT AND PRIEST-PENITENT PRIVILEGE

The Supreme Court has recognized:

"The right of privacy has no more conspicuous place than in the physician-patient relationship unless it be in the priest-penitent relation." *Doe v. Bolton*, 410 U.S. 179, 93 S.Ct. 739, 35 L.Ed.2d 201 (1973).

See also In re Grand Jury Subpoena, 710 F. Supp. 999 (D.N.J. 1989) [psychotherapist-patient privilege protecting the confidential communications of psychotherapy patients recognized in federal grand jury investigation].

However, in the context of a grand jury investigation at least one court that "principles of common law" do not allow for recognition of the psychotherapist - patient privilege. *See Tumlinson v. State*, 663 S.W.2d 539 (Tex.App. - Dallas 1984, pet. for discr. rev. ref=d), *appeal after remand*, 757 S.W.2d 440 (Tex.App. Dallas B 1988, pet. for discr. rev. refd) [mental health privilege repealed in interim between first trial and second did not affect a substantive right of the Defendant for ex post facto analysis. The admission of psychotherapist's testimony at the second trial resulted from a change in a procedural rule which only effected an enlargement of the class of witnesses who could testify at a trial].

MARITAL PRIVILEGES

ADVERSE SPOUSAL TESTIMONY VS. MARITAL COMMUNICATIONS

The so-called marital or spousal privilege could be said to encompass two distinct protections: the "privilege against adverse spousal testimony" which is separate and apart from "...the independent rule protecting confidential marital communications." *Trammel v. U.S.*, 445 U.S. 40 (1980); *U.S. v. Burton*, 631 F.2d 280, 281-82 (4th Cir. 1980); *U.S. v. Cameron*, 556 F.2d 752, 755 (5th Cir. 1977); *U.S. v. Mendoza*, 574 F.2d 1373, 1379 (5th Cir.), *cert. denied*, 439 U.S. 988 (1978); *U.S. v. Entreben*, 624 F.2d 597, 598 (5th Cir. 1980), *reh'g. denied*, 629 F.2d 1350, *cert. denied*, 451 U.S. 971(1981).

"This Court previously has held that conversations between husband and wife about crimes in which they are jointly participating when the conversations occur are not marital communications for the purpose of the marital privilege, and thus do not fall within the privilege's protection of confidential marital communications." *U.S. v. Entreben*, 624 F.2d 597, 598 (5th Cir. 1980).

See *U.S. v. Koehler*, 790 F.2d 1256, 1258 (5th Cir. 1986) [describing the two distinct marital privileges the witness-spouse privilege, prevents the government from compelling a spouse to testify against his or her spouse. In federal court, however, the Supreme Court has held that this privilege may be asserted only by the witness spouse, not the defendant spouse. The second marital privilege is the spousal communication privilege. This privilege protects communications "uttered in private between husband and wife." The privilege applies only to communications, and not to acts.]

ADVERSE TESTIMONIAL PRIVILEGE VESTS IN TESTIFYING SPOUSE

The privilege against adverse spousal testimony belongs to the witness spouse. *Trammel v. U.S.*, 445 U.S. at 53.

"We conclude that the existing rule should be modified so that the witness spouse alone has a privilege to refuse to testify adversely; the witness may be neither compelled to testify nor foreclosed from testifying." *Trammel v. U.S.*, 445 U.S. at 53.

COVERT ACT AND COMMUNICATIONS

The privilege against adverse spousal testimony "... is invoked, not to exclude private marital communications, but rather to exclude evidence of *criminal acts and of communications*". *Trammel v. U.S.*, 445 U.S. at 51. Unlike the attorney-client, physician-patient, or priest-penitent privileges, the privilege against adverse spousal testimony "is not limited to confidential communications". *Trammel v. U.S.*, 445 U.S. at 51.

NEED NOT BE CONFIDENTIAL

And while the "confidential marital communications privilege" protects only "communications between the spouses" rather than "objective facts", *Percira v. U.S.*, 347 U.S. 1, 74 S.Ct. 358 (1954), the "privilege against adverse spousal testimony" covers both "criminal acts and of communications made in the presence of third persons". *Trammel v. U.S.*, 445 U.S. at 51.

PRIVILEGE APPLIES TO MATTERS PRIOR TO MARRIAGE

Absent a sham or collusive marriage the privilege against adverse spousal testimony applies without regard to whether testimony concerns matters prior to the marriage. *In re Grand Jury Proceedings*, 640 F. Supp. 988 (E.D. Mich. 1986).

But see U.S. v. Roberson, 859 F.2d 1376 (9th Cir. 1988) [although couple was still technically married the marital privilege did not apply as couple was irreconcilably separated at time of

communication]; *U.S. v. Singleton*, 260 F.3d 1295 (11th Cir. 2001)[marital privilege not applicable to tape recording of conversation between couple who had permanently separated and for who there was no reasonable expectation of reconciliation].

CRIMINAL ENTERPRISE EXCEPTION APPLIES ONLY TO "CONFIDENTIAL COMMUNICATIONS PRIVILEGE" NOT "ADVERSE TESTIMONIAL PRIVILEGE"

The so-called "criminal enterprise exception", which excludes from protection "conversations between husband and wife about crimes in which they are jointly participating when the conversations occur", applies only to the privilege's "protection of confidential marital communications". *U.S. v. Mendoza*, 574 F.2d 1373, 1381 (5th Cir.), *cert. denied*, 439 U.S. 988 (1978); *U.S. v. Entrekin*, 624 F.2d 597, 598 (5th Cir. 1980), *reh'g. denied*, 629 F.2d 1350, *cert. denied*, 451 U.S. 971(1981).

Thus, contrary to the rule with respect to the "confidential marital communications privilege", even where "the spouses have been partners in crime" and the witness spouse "was allegedly involved in the criminal acts of her husband", the "privilege against adverse spousal testimony" is not abrogated and same constitutes "no exception to the privilege." *Appeal of Malfitano*, 633 F.2d 276, 277-80 (3d Cir. 1980) [well-reasoned discussion].

TESTIMONY NEED NOT BE TECHNICALLY INCRIMINATING TO BE "ADVERSE"

In order for the witness to invoke the "adverse spousal testimony" privilege the inquiry need only indirectly inculcate the non- testifying spouse. *In re Grand Jury (Malfitano)*, 633 F.2d 276, 280 (3d Cir. 1980); *U.S. v. Armstrong*, 476 F.2d 313, 315-16 (5th Cir. 1973); *In re Grand Jury*, 673 F.2d 688 (3d Cir. 1982).

CRUEL TRILEMMA

As one court noted:

"A witness before a grand jury should not be compelled to choose among perjury contempt, or disloyalty to a spouse." *In re Grand Jury Investigation*, 603 F.2d 786, 789 (3d Cir. 1979).

ATTORNEY-CLIENT PRIVILEGE

FEDERAL :

The federal attorney-client privilege was designed to encourage and foster the candid disclosure of information essential to providing the effective assistance of counsel guaranteed an

accused by the Sixth Amendment. Careful attention should be paid to the context in which attorney-client communications take place. In *In re Grand Jury Subpoenas Dated March 9, 2001*, 179 F. Supp. 2d 270 (S.D. N. Y. 2001) the court concluded that the lawyers, seeking executive clemency from President Clinton for Marc Rich, were acting as lobbyists rather than lawyers. Thus Judge Chin held that the documents withheld under attorney-client and work doctrine privileges were subject to production in the grand jury probe.

ATTORNEY/CLIENT PRIVILEGE IS APPLICABLE TO GRAND JURY PROCEEDINGS

Privileges, see FED. R. EVID. Rule 501, such as the marital and attorney-client privilege, apply in Grand Jury proceedings. 2 LOUISELL, FEDERAL EVIDENCE ' 218, at 631. While a Grand Jury "may consider incompetent evidence, . . . it may not itself violate a valid privilege, whether established by the Constitution, statutes, or the common law". *U.S. v. Calandra*, 414 U.S. 338, 346 (1974). This is important, because use immunity under ' 6002 et. seq. is coextensive with the witnesses' Fifth Amendment privilege. *Kastigar v. U.S.*, 406 U.S. 441 (1972). That is, an immunity grant only removes one's protection under the Fifth Amendment, it does not preclude assertion of other valid privileges which may be applicable.

COMPELLING GRAND JURY WITNESS TO INVOKE ATTORNEY-CLIENT PRIVILEGE

A Pennsylvania state court recently held that a criminal defendant has a right to compel a witness to invoke the attorney-client privilege in front of a petit jury as part of his defense strategy to shift criminal responsibility to the testifying witness. *Commonwealth v. Sims*, 521 A.2d 391 (Pa. 1987).

"We recognize the firmly established principle that the prosecution in a criminal defense case may not call a witness who it has reason to believe will refuse to testify on the basis of a constitutional privilege against self-incrimination. [citations omitted] In those cases we said that such a tactic would unfairly prejudice the defendant by the innuendo of guilt by association. That reasoning is not applicable, however, where the defendant attempts to cross-examine a witness who has been called by the Commonwealth as the principal accuser against him. To insulate such a witness from having to invoke his privilege in the jury's presence, as did the trial court in this case, unfairly bolstered the credibility of a witness whose testimony was crucial to the success of the prosecution. [FN1] There is nothing in the privilege or its purposes which militates against allowing the jury to at least know that a claimant of the privilege, while testifying as witness, has elected to withhold from the jury's consideration possible previous statements made by him concerning the matter on trial. The communication itself is not revealed nor is the interest of the witness adversely affected thereby. For these reasons we are forced to conclude

that the trial judge's refusal to require Hilton to invoke the privilege in the presence of the jury was an unacceptable infringement upon appellant's right of confrontation." *Commonwealth v. Sims*, 521 A.2d 391 (Pa. 1987).

See In re Grand Jury Proceedings, 43 F.3d 966 (5 Cir. 1996) [holding that although documents were prepared by attorneys in contemplation of terminated criminal investigation of client for money laundering, documents continued to be protected by work-product privilege in subsequent broadened grand jury investigation of money laundering by client and others.]

ATTORNEY-CLIENT

WHERE THE VERY EXISTENCE OF THE ATTORNEY-CLIENT RELATIONSHIP MIGHT BE INCRIMINATING TO A CLIENT, SAME MAY UNDER LIMITED CIRCUMSTANCES BE PRIVILEGED

While generally the identity and information concerning the fee arrangement between an attorney and his client is not privileged, *Frank v. Tomlinson*, 351 F.2d 384 (5th Cir. 1965), *cert. denied*, 382 U.S. 1028 (1966); *U.S. v. Finley*, 434 F.2d 596 (5th Cir. 1970); *In re Michaelson*, 511 F.2d 882, 889 (9th Cir. 1975); *In re Osterhoudt*, 722 F.2d 591, 592 (9th Cir. 1983); *In re Shargel*, 742 F.2d 61, 64 (2d Cir. 1984); *In the Matter Before the Special March 1980 Grand Jury*, 729 F.2d 489 (7th Cir. 1984). An exception has been made where the existence of the attorney-client relationship might be incriminating in the very matter in which advice has been sought. *In re Semel*, 411 F.2d 195, 197 (3d Cir. 1969) ["[A]n exception is made for cases where the existence of the attorney-client relationship might be incriminating to a client"]; *In re Grand Jury Proceedings (Jones)*, 517 F.2d 666 (5th Cir. 1975).

But see In re Grand Jury Proceedings (Pavlick), 680 F.2d 1026, 1028-29 (5th Cir. 1982); *In re Grand Jury Proceedings (Damore)*, 689 F.2d 1351, 1352 (11th Cir. 1982); *In re Grand Jury Proceedings (Slaughter)*, 694 F.2d 1258 (4th Cir. 1982).

Both the Fifth and Eleventh Circuits have now limited the applicability of this exception to situations where the disclosure of a client's identity and fee would supply the "last link in an existing chain of incriminating evidence likely to lead to the client's indictment". *In re Grand Jury Proceedings (Damore)*, 689 F.2d 1351, 1252-53 (11th Cir. 1982) [citing *Jones*]; *In re Slaughter*, 694 F.2d 1258, 1259 (11th Cir. 1982) [describing same as a "limited and rarely available 'exception ...involv[ing] situations where the disclosure of fee information would give the identity of a previously undisclosed client/suspect'"]; *In re Grand Jury Proceedings (Pavlick)*, 680 F.2d 1026 (5th Cir. 1982).

"In [our *Jones*] holding, we expressly noted that our decision rested on the peculiar facts of that case.... Among those 'peculiar facts' was that the six attorneys drawn before the grand jury in *Jones* represented a generous portion of the criminal law

bar of the lower Rio Grande Valley area, and the project was a rather broad attempt to canvas that portion for information detrimental to certain of its clients: that each had paid an attorney or attorneys amounts greater than this reported gross income during the year of payment. This and other features distinguish *Jones* from our case, including that the identity sought here was by no means the last link in any chain of inculpatory events or transactions, rather the contrary." *In re Grand Jury Proceedings (Pavlick)*, 680 F.2d at 1027(5th Cir. 1981).

Furthermore, the Fifth Circuit, at least intimates that a "conspiratorial agreement" by the clients to prospectively provide counsel to a fellow confederate in the event of his arrest may be inferred from "custom or a prior course of conduct toward other apprehendees". *In re Grand Jury Proceedings (Pavlick)*, 680 F.2d 1026 (5th Cir. 1981).

"...where the government makes a prima facie showing that an agreement to furnish legal assistance was part of a conspiracy, the crime or fraud exception applies to deny a privilege to the identity of him who foots the bill - and this even though he be a client of the attorney and the attorney unaware of the improper arrangement. Such an agreement, of course, need only be an effective one, need not be express, and might in a proper case be found to arise even from a custom or a prior course of conduct toward other apprehendees." *In re Grand Jury Proceedings (Pavlick)*, 680 F.2d at 1029(5th Cir. 1981).

Courts and commentators, often separate the exceptions into one of three categories.

1. THE "LAST LINK EXCEPTION":

Attorney-client privilege applies to a client's identity and fee arrangements only where disclosure of same would supply the "last link" in an existing chain of incriminating evidence likely to lead to the client's indictment". *In re Grand Jury Proceedings (Pavlick)*, 680 F.2d 1026, 1027 (5th Cir. 1982).

Rejected by *In re Witness Before Special March 1980 Grand Jury*, 729 F.2d 489, 491-95 (7th Cir. 1984);

In re Grand Jury Investigation No. 83-2-35, 723 F.2d 447, 454 (6th Cir. 1983).

In 1990, the Fifth Circuit took this trend one step further, all but overruling the *Jones* exception. Citing "*The Return of the Pink Panther*," the Court held that *Jones* only applies where the payment of the fee is coupled with confidential attorney-client communications, which would necessarily be revealed if the fee arrangement were disclosed.

"*Jones* is not unlike the actor Peter Sellers' famous character Inspector Clouseau: it has been misunderstood because it invited misunderstanding. We conclude that a proper reading of *Jones* followed by *Pavlick* demonstrates that those cases did not

fashion a "a last link" or "affirmative link" attorney-client privilege independent of the privileged communications between an attorney and his client. Thus, "the last link" or "affirmative link" language in these cases did not significantly amend the normal scope of the attorney-client privilege, nor is it applicable to the case before us.

"[D]espite the opinion's frequent references to the potentially incriminating nature of the testimony sought from the attorneys, *Jones* does not seem to rest on that fact *apart from* its necessary, simultaneous revelation of confidential communications. *In re Grand Jury subpoena for Reyes-Requena*, 913 F.2d 1118, 1124 (5th Cir. 1990) [*Reyes-Requena I*].

The Court also held that in order to receive Jones Protection, the attorney must first demonstrate that the fees were either paid by the client, or by a third party *who is also a client*. The problem with the *Reyes-Requena* approach is that the rule swallows the exception. That is, confidential communications between clients and their attorneys have *always* been protected. Thus, an "exception" which continues to protect those communications when they are coupled with a fee agreement would not seem to be an exception at all, but rather a mechanical application of the general rule. What was unique about the *Jones* exception was that it protected from disclosure not only confidential communications, but also the existence of the attorney-client relationship itself.

In a later, closely connected case, the 5th circuit reopened the *Jones* umbrella. *In re Grand Jury Subpoena for Attorney Representing Criminal Defendant Reyes-Requena*, 926 F.2d 1423 (5th Cir. 1991) [*Reyes-Requena II*]. The defendant's attorney submitted affidavits *in camera* demonstrating that Intervenor, the anonymous third party fee payer, had indeed sought legal advice on Intervenor's own behalf, in conjunction with the payment of Reyes-Requena's fee. The Court intimated that the "inextricable intertwining" of the fee payer's identity with "confidential communications" might be easier to demonstrate than it would at first appear:

"The government is not creditable when it asserts that it sought only the fact of intervenor's identity rather than confidential communications. The government admits that it sought Intervenor's identity because DeGeurin was representing a man of meager means caught while serving in a lower echelon role in a drug trafficking operation of substantial proportion. The government clearly sought Intervenor's identity in hopes of broadening their investigation, which was limited to Reyes-Requena, by adding more charges against Reyes-Requena and by obtaining more defendants to charge in a conspiracy. In these circumstances, the government cannot credibly argue that it seeks merely neutral facts." 926 F.2d at 1432.

2. THE "LEGAL ADVICE" EXCEPTION:

The exception to required disclosure of a client's identity and fee arrangements applies only where the disclosure of such information would implicate the client in the very matter for which he sought advice. *In re Grand Jury Investigation No. 83-2-35*, 723 F.2d 447, 452 (6th Cir. 1983);

U.S. v. Strahl, 590 F.2d 10, 12 (1st Cir. 1978); *In re Grand Jury (Harvey)*, 676 F.2d 1005, 1009 (4th Cir.), *vacated on other grounds*, 697 F.2d 112 (4th Cir. 1982) (en banc).

3. THE CONFIDENTIAL COMMUNICATION EXCEPTION:

Exception applies only where disclosure of client's identity and fee arrangements would reveal "the *substance* of confidential professional communications" between attorney and client. *In re Grand Jury Proceedings (Osterhoudt)*, 722 F.2d 591, 594 (9th Cir. 1983).

CLIENT WITH PENDING CASE

In one recent case the court held that calling an attorney before a grand jury to testify regarding his fee arrangements with a client he represents in "cases pending for trial" violates the client's Sixth Amendment right to counsel.

In re Grand Jury Matters, 593 F. Supp. 103, 107 (D.N.H. 1984), *aff'd*, 751 F.2d 13, 17 (1st Cir. 1984) [noting "the importance that the federal constitution places upon the right to counsel in criminal prosecutions" and that "in these circumstances ...the *timing* of the subpoenas unduly and unnecessarily burdens that right"].

"The actions of the U.S. Attorney are without doubt harassing, show minuscule perception of the untoward results not only to those who practice criminal law, but those in the general practice of law.... The use of the phrase chilling effect upon the role of an attorney engaged in criminal defense work by being served a subpoena in circumstances such as this is mild. To permit it would have an arctic effect with the non-salutary purpose of freezing criminal defense attorneys into inanimate ice flows, bereft of the succor of constitutional safeguards." *In re Grand Jury Matters*, 593 F. Supp. 103, 107 (D. N.H. 1984), *aff'd*, 751 F.2d 13 (1st Cir. 1984).

See also *In re Grand Jury Subpoena Duces Tecum Dated Jan. 2, 1985 (Payden)*, 767 F.2d 26, 39 (2d Cir. 1985).

"The law is settled in this circuit and elsewhere that '[i]t is improper to utilize a Grand Jury for the sole or dominating purpose of preparing an already pending indictment for trial,' *United States v. Dardi*, 330 F.2d 316, 336 (2d Cir.), *cert. denied*, 379 U.S. 845, 85 S.Ct. 40, 13 L.Ed.2d 50 (1964). See 8 MOORES FEDERAL PRACTICE & 6.04[5] at 6-86 (1984)."

But see In re Grand Jury Subpoena Served Upon John Doe, Esq., 781 F.2d 238 (2d Cir. 1986).

"The Sixth Amendment protects Colombo's right to be free from unduly burdensome interruption of his counsel's trial preparation and protects him from any unnecessary or arbitrary disqualification of his counsel. Assessment of whether the subpoena is unreasonable or burdensome can be determined under Rule 17(c). While involuntary disqualification of counsel may prevent an accused from retaining counsel of his choice, courts have the power and duty to disqualify counsel where the public interest in maintaining the integrity of the judicial system outweighs the accused's constitutional right.

...And, as with the pre-indictment claim, the possibility of disqualification is not a basis for declining to enforce the subpoena; it is an issue for the trial judge if disqualification should arise."

DISCUSSIONS BETWEEN AN INDIVIDUAL AND "A LAWYER REPRESENTING ANOTHER IN A MATTER OF COMMON INTEREST" ARE PRIVILEGED

Recognizing that the privilege rules promulgated by the Supreme Court "remain of considerable utility as standards", the United States District Court for the Eastern District of New York noted that the attorney client privilege would attach to prevent disclosure of communications by an individual "to a lawyer representing another in a matter of common interest". *U.S. v. Mackey*, 405 F. Supp. 854, 858 (E.D.N.Y. 1975).

JOINT DEFENSE/REPRESENTATION

The "sharing of information between counsel for parties having common interest should not destroy the work product privilege".

Duplan Corporation v. Deering Milliben, Inc., 397 F. Supp 1146, 1172 (D.S.C. 1974); *Continental Oil Company v. U.S.*, 330 F.2d 347 (9th Cir. 1964); *Hunydee v. U.S.*, 355 F.2d 183, 185 (9th Cir. 1965); *Hyd Const. Co. v. Coehring Co.*, 455 F.2d 337 (5th Cir. 1972); *In re Grand Jury Subpoena*, 406 F. Supp 381 (S.D.N.Y. 1975); *In re LTV Securities Litigation*, 89 F.R.D. 595, 604 (N.D. Tex.1981).

"An examination of the few cases dealing directly with the question of privilege based upon the attorney-client relationship would seem to indicate that persons represented by different attorneys but conducting a 'joint defense' may pool information without waiving this privilege." *Transmirra Products Corp. v. Monsanto Chemical Co*, 26 F.R.D. 572, 576-7 (S.D. N.Y. 1960).

Indeed, the main purpose for the creation of the attorney-client privilege is to allow just such communications to be made in the interest of establishing a legal defense".

Duplan Corporation v. Deering Milliben, Inc., 397 F. Supp. 1146, 1172 (D.S.C. 1974).

PRIVILEGE ATTACHES "FROM THE INITIAL SALUTATION AND GREETING ON"

The joint defense privilege attaches to communications between a lawyer and potential clients who are seeking representation "from the initial greeting and salutation on." *In re Grand Jury Proceedings, Jean Auclair*, 961 F.2d 65, 70 (5th Cir. 1992). Just as with the attorney-client privilege, the defendant need not wait until the attorney has accepted the case before he can safely consider his communications privileged and confidential. *Id.* This complies with the ethical requirement that a lawyer learns the facts of the case and makes a determination whether any probable conflicts will arise from the representation of two people seeking advice in the same matter.

PRIVILEGE MUST BE WAIVED BY ALL DEFENDANTS

Once the joint defense privilege has attached, it cannot be waived unless all holders of the privilege (i.e., all the clients) agree to waive it. *Chahoon v. Commonwealth*, 62 Va. 822 (Va. 1872); *In re Grand Jury Proceedings, Jean Auclair*, 961 F.2d 65 (5th Cir. 1992).

WRITTEN AGREEMENT NOT NECESSARY

While the safest course is to enter into a formal written joint defense agreement before sharing information among defense counsel, such a document is not a vital element of the privilege. *Cf. In re Grand Jury Proceedings, Jean Auclair*, 961 F.2d 65 (5th Cir. 1992).

ONE WITH RETAINED COUNSEL IN A MATTER MAY NOT BE CONTACTED BY THE PROSECUTION

The ABA Code of Professional Responsibility expressly mandates that:

"DR7-104. Communicating with One of the Adverse Interest.

"(A) During the course of his representation of a client a lawyer shall not:

"(1) Communicate or cause another to communicate on the subject of the representation with a party he knows to be represented by a lawyer in that matter unless he has the prior consent of the lawyer representing such other party or is authorized by law to do so."

What this means is that once a criminal defendant is represented by an attorney the Government may not communicate with that defendant unless his/her attorney is notified. *See U.S. v. Thomas*, 474 F.2d 110, 112 (10th Cir.), *cert. denied*, 412 U.S. 932, 93 S.Ct. 2758, 37 L.Ed.2d 160 (1973). The Fifth Circuit has recognized that conduct which violates this Canon of Ethics is reprehensible and suppression is the appropriate sanction. *U.S. v. Killian*, 639 F.2d 206, 210 (5th Cir.), *cert. denied sub nom, Brunk v. U.S.*, 451 U.S. 1021, 101 S.Ct. 3014, 69 L.Ed.2d 394 (1981) [noting the defendant relied solely on the violation of "ethical principle of the legal profession"].

"We agree that the conduct which occurred in this case was highly improper and unethical. ...Suppression of the statements would probably have been the appropriate sanction in this case, were it not for the refusal of the government to use those statements. ...The action that was taken in this case is truly reprehensible and taints the dignity of the offices of the U.S. Attorney, the DEA and the FBI." *U.S. v. Killian*, 639 F.2d at 210.

Whether DR7-104(A)(1) is violated pre or post indictment suppression is warranted. *U.S. v. Hammad*, 858 F.2d 834 (2d Cir. 1988). "Moreover, we resist binding the Code's applicability to the moment of indictment. The timing of an indictment's return has substantially within the control of the prosecutor. Therefore, were we to construe the rule as dependant upon indictment, a government attorney could manipulate grand jury proceedings to avoid its encumbrances." *U.S. v. Hammad*, 858 F.2d 834 (2d Cir. 1988).

At least one court has dismissed an indictment on the grounds of prosecutorial misconduct, where the prosecutor contacted represented defendants without their lawyers' knowledge. *United States v. Lopez*, 765 F.Supp. 1433 (N.D.Ca. 1991).

"Relying on a faulty and tortured reading of existing authority, the Attorney General has issued a policy directive instructing attorneys of the Department of Justice to disregard a fundamental ethical rule embraced by every jurisdiction in this country. In the case at bar, the Attorney General's policy resulted in both the intentional disregard of the court's Local Rules by the Assistant United States Attorney and the loss by the defendant of his counsel of choice. . . . This court will not allow the Attorney General to make a mockery of the court's constitutionally-granted judicial powers. The title U.S. Attorney does not give the prosecutor a hunting license exempt from the ethical constraints of advocacy. . . . [T]he court is convinced that no remedy short of dismissal will have any significant deterrent effect on future government misconduct of the type found in this case. Therefore, the court hereby exercises its supervisory power and DISMISSES the indictment of Jose Orlando Lopez." *Lopez*, 765 F.Supp. At 1463.

Since the *Lopez* decision Congress enacted a statute, which makes the codes of ethics applicable to prosecutors, thus removing the Attorney General's argument that the Supremacy Clause exempted government lawyers from ethical rules of professional conduct.

COMMUNICATIONS BETWEEN CORPORATIONS AND CORPORATE COUNSEL

While a corporate employee's communications to the corporation's legal counsel may be protected under the attorney-client privilege, one court has held that *former* corporate employees may not be protected. *Connolly Data Systems, Inc. v. Victor Technologies, Inc.*, 114 F.R.D. 89 (S.D. Cal. 1987).

PRIVILEGE PROTECTS COMMUNICATIONS AT MEETING BETWEEN "PERSONS SUBJECT TO POSSIBLE INDICTMENT" AND THEIR LAWYER

It is well recognized that the privilege protects communications "[W]here two or more persons who are subject to possible indictment in connection with the same transactions make confidential statements to their attorneys".

Hunydee v. U.S., 355 F.2d 183, 185 (9th Cir. 1965).

"How well could a joint defense proceed in the light of each co-defendant's knowledge that any one of the others might trade resultant disclosures to third parties as the price of his own exoneration...?" *In re Grand Jury Subpoena*, 406 F. Supp. 381 (S.D. N.Y. 1975).

And such "privilege belongs to each and all of the clients and should not be viewed to have been waived without the consent of all of them".

Chahoon v. Commonwealth, 62 Va. 1036, 1042 (Va. 1971).

However, the Supreme Court has held that the fact that a government witness posed as a defendant and attended joint meetings prior to and during trial did not violate other Defendant's Sixth Amendment right to effective assistance of counsel or Fifth Amendment right to fair trial, where no showing could be made the prosecution was informed of or utilized any information gained by said witness in his capacity as a co-defendant.

Weatherford v. Bursey, 429 U.S. 545 (1977).

On the other hand, where it can be demonstrated the government has utilized an informant or other means to eavesdrop on privileged communications between a client and his attorney, same has been held to intrude upon and deprive the defendant of his right to effective assistance of counsel.

See *Hoffa v. U.S.*, 385 U.S. 293 (1966);
U.S. v. Klieffen, 557 F.2d 1293 (9th Cir. 1977);
U.S. v. Valencia, 541 F.2d 618 (6th Cir. 1976);
U.S. v. Zarzour, 432 F.2d 1 (5th Cir. 1970);
Caldwell v. U.S., 205 F.2d 879 (D.C. Cir. 1953);
Coplon v. U.S., 191 F.2d 749 (D.C. Cir. 1951);
U.S. v. Ostrer, 422 F. Supp. 93 (S.D. N.Y. 1976);
In re Bull, 123 F. Supp. 389 (D. Nev. 1954);
U.S. v. Levy, 577 F.2d 200 (3d Cir. 1977);
U.S. v. Rispo, 460 F.2d 965 (3d Cir. 1972);
U.S. v. Crow Dog, 532 F.2d 1182 (8th Cir. 1976) [noting Government informant used as "sham" defendant in joint proceedings].

CRIME-FRAUD EXCEPTION

The attorney-client privilege has generally been held inapplicable where advice is sought to assist, further, or induce a crime.

U.S. v. Morales-Martinez, 672 F. Supp. 762 (D. Vt. 1987);
U.S. v. Berry, 627 F.2d 193 (9th Cir. 1980);
U.S. v. Aldridge, 484 F.2d 655 (7th Cir. 1973);
U.S. v. Freidman, 445 F.2d 1076 (9th Cir. 1971);
Garner v. Wolfenbarger, 430 F.2d 1093 (5th Cir. 1970).

This exception has been held to render the attorney-client privilege inapplicable even where the attorney is unaware of any ongoing criminal or fraudulent purpose on the part of the client.

In re Grand Jury Proceedings in the Matter of Fine, 641 F.2d 199 (5th Cir. 1981);
U.S. v. Pavlick, 680 F.2d 1026, 1028 (5th Cir. 1982) (en banc);
In re Grand Jury Proceedings (Damore), 689 F.2d 135, 135 (11th Cir. 1982).

The Government bears the burden of demonstrating the existence of the crime or fraud and that the communications were made with respect to, in furtherance of, or to induce the illegal acts involved.

Clark v. U.S., 289 U.S. 1, 15 (1933);
Matter of Walsh, 623 F.2d 489 (7th Cir. 1980);
In re Grand Jury Proceedings in the Matter of Fine, 641 F.2d 199 (5th Cir. 1981);
U.S. v. Friedman, 445 F.2d 1076, 1086 (9th Cir. 1971).

The standard has been held to be a "prima facie showing that [the attorney] was retained in order to promote intended or continuing criminal or fraudulent activity".

In re Grand Jury Proceedings (Pavlick), 680 F.2d 1026 (5th Cir. 1982) (en banc);
In re Grand Jury Proceedings (Damore), 689 F.2d 1351, 1352 (11th Cir. 1982) ["This Court is not bound by *Pavlick* ...but we approve its reasoning"]. At the very least, the Government must be able to demonstrate a connection between the attorney's services sought by this client and the criminal enterprise;
In re Grand Jury Proceedings (Fine), 641 F.2d 199, 204 (5th Cir. 1981).

IN CAMERA REVIEW

In *U.S. v. Zolin*, 491 U.S. 554, 109 S. Ct. 2619, 105 L.Ed.2d 469, 490 (1989), the Supreme Court, after first concluding that nothing in the Federal Rules of Evidence bars such use of in camera review, held that when a party alleging a crime-fraud exception to the attorney-client privilege requests an in camera review of the privileged material, that party must first show "a factual basis adequate to support a good faith belief by a reasonable person ...that in camera review of the materials may review evidence to establish the claim that the crime-fraud exception applies".

Once the party opposing the privilege has made such a showing, the district court, within its sound discretion, may conduct such an *in camera* review. *Id.*

A strong suspicious appearance that the attorney's services are somehow connected with the crime or fraud is insufficient to destroy the attorney-client privilege.

In re Grand Jury Proceedings (Fine), 641 F.2d at 204;
In re Grand Jury Proceedings, 600 F.2d 215, 218-9 (9th Cir. 1979).

"As a matter of law, these ...facts alone are inadequate to serve as the basis for a prima facie showing that [advice was sought] to further a criminal enterprise. These facts may support a strong suspicion, which is often enough for police and prosecutors, but it is not enough for courts. *In re Grand Jury Proceedings*, 600 F.2d 215, 218-19 (9th Cir. 1979)." *In re Grand Jury Proceedings (Fine)*, 641 F.2d 199, 204 (5th Cir. 1981); *but see In re Grand Jury Proceedings*, 803 F.2d 493 (9th Cir. 1986) ("It is not the law that the requisites of the attorney-client privilege are met whenever evidence regarding the fees paid the attorney would implicate the client in a criminal offense regarding which the client sought the attorney's legal advice . . . The attorney-client privilege protects a client's identity only in limited circumstances where disclosure would convey the substance of a confidential professional communication between the attorney and the client.").

However, the Fifth Circuit, at least intimates such "conspiratorial agreement" by the clients to prospectively provided counsel may be inferred from "custom or a prior course of conduct toward other apprehendees".

In re Grand Jury Proceedings (Pavlick), 680 F.2d 1026 (5th Cir. 1981).

"...where the government takes a prima facie showing that an agreement to furnish legal assistance was part of a conspiracy, the crime or fraud exception applies to deny a privilege to the identity of him who foots the bill and this even though he be a client of the attorney and the attorney unaware of the improper arrangement. Such an agreement, of course, need only be an effective one, need not be express, and might in a proper case be found to arise even from a custom or a prior course of conduct toward other apprehendees." *In re Grand Jury Proceedings (Pavlick)*, 680 F.2d at 1029.

One circuit has even held that carrying the name and address of a criminal defense attorney when arrested is circumstantial evidence of consciousness of guilt.

U.S. v. Tille, 729 F.2d 615 (9th Cir. 1984).

PRELIMINARY REQUIREMENT OF RELEVANCY

While some circuits require a preliminary showing of the relevancy of any testimony regarding such matters;

In re Grand Jury Proceedings (Schofield, II), 507 F.2d 963 (3rd Cir.), cert. denied, 421 U.S. 1015 (1975);

others have not required such a showing as a prerequisite to compelling counsel's testimony;

U.S. v. Guerrero, 567 F.2d 281 (5th Cir. 1978);

In re Grand Subpoena (Battle), 748 F.2d 327, 330 (6th Cir. 1984);

In re Grand Jury Proceedings, 694 F.2d 1258 (11th Cir. 1982).

PRELIMINARY REQUIREMENT OF NEED

In addition to a "relevancy" requirement the Fourth Circuit has required a showing that there exists "an important need for the information sought".

In re Special Grand Jury (Harvey), 676 F.2d at 1011.

The prosecution must address two inquiries when making a showing of need:

(1) is the information sought necessary or important to the grand jury investigation?
and

(2) is the subpoenaed attorney the best or only source for the information? *Id.* at 1011n.6.

But See *In re Grand Jury Subpoena Served Upon John Doe, Esq. (Slotnic)*, No. 84-6319, 38 Cr.L.Rptr. 2313, 2314 (2d Cir. 1986) (en banc) [overturning a panel decision];
In re Grand Jury Proceedings (Doe), 759 F.2d 968 (2d Cir. 1985) (panel) [imposing requirements of a particularized need and the information's unavailability from a non-attorney source].

GRANT OF IMMUNITY TO CLIENT DOES NOT DESTROY ATTORNEY-CLIENT PRIVILEGE

Since the policies underlying the attorney-client privilege go beyond merely the client's Fifth Amendment privilege against self-incrimination [i.e. to encourage frank discussions between client and counsel], the privilege should not be destroyed by any grant of immunity to the client.

LAW OFFICE SEARCHES

The search of a law office's files and records impinges not only the Fourth Amendment rights of the attorneys, but the confidentiality of his work-product and his clients' correspondence and records. While some courts have held such searches unreasonable per se, *O'Conner v. Johnson*, 287 NW2d 400 (Minn. 1979); others have imposed a particularity requirement of "scrupulous exactitude";

U.S. v. Abrams, 615 F.2d 541 (1st Cir. 1980);

analogous to that required in the First Amendment area.

See *Zurcher v. Stanford Daily*, 436 U.S. 547 (1978) [search of student newspaper office];
Stanford v. Texas, 379 U.S. 476 (1965) [search for communist literature];
Roden v. Kentucky, 413 U.S. 496 (1973).

See also *Federal Guidelines for Law Office Searches*, 28 C.F.R. ' '59 & 59.4c(1)- (2) (1981);
Bloom, *The Law Office Search*, 69 GEO.L.J. 107 (1980).

Courts have held that seizures pursuant to over broad warrants violate both the attorney-client privilege and the Privacy Protection Act [42 U.S.C. ' 2000aa-11], suggesting that in the future a "special master" should be appointed to supervise the process of determining what records are privileged. *Klitzman, Klitzman and Gallagher v. Krent*, 744 F.2d 955 (3d Cir. 1984).

STATE

TEXAS HAS BROADER MORE ENCOMPASSING ATTORNEY-CLIENT PRIVILEGE

In Texas, an attorney is incompetent to testify as to any fact which came to his knowledge by reason of the attorney-client relationship. TEX. R. EVID. 503.

The rule's predecessor, TEX. R. CRIM. P. Art. 38.10 provided in part:

"All other Competent Witness.

All other persons ...whatever may be the relationship between the defendant and witness, are competent to testify, except that an attorney at law shall not disclose a communication made to him by his client during the existence of that relationship, nor disclose any other fact which came to the knowledge of such attorney by reason of such relationship."

TEX. R. EVID Rule 503(b) expressly provides:

"A client has a privilege to prevent the lawyer or the lawyer's representative from disclosing any ...fact which came to the knowledge of the lawyer or the lawyer's representation by reason of the attorney-client relationship." This all-encompassing statutory attorney-client privilege has been in effect long before the enactment of the Texas Rule or predecessor, TEX. R. CRIM. P. Art. 38.10.

Courts in Texas have applied this principle, holding that knowledge of an attorney as to the location of a Deed of Trust relevant to a criminal trial was privileged in a criminal trial.

Downing v. State, 136 SW 471 (Tex.Cr.App. 1911).

Texas Courts have as well held that the payment and amount of attorney's fees is within the proscription prohibiting such testimony.

Holden v. State, 71 SW 600 (Tex.Cr.App. 1903).

"Appellant ...excepted to the action of the court, requiring M.C. Cullen, an attorney at law, and who had previously represented defendant in this case as her counsel and attorney, to testify that when defendant employed him she gave him \$10 as a fee. She paid him two \$5 bills. This was objected to on the ground that it was a privileged communication between attorney and client. The court overruled this objection, and witness was compelled to testify.... This testimony should not have been admitted. There was no dispute as to the relation of attorney and client, and the evidence introduced was in fact transpiring by virtue of that employment.... And it has been expressly held that it does not matter whether the information has

been derived from a client's words, actions, or personal appearance."
Holden v. State, 71 SW at 601.

Cf. *Braesfield v. State*, 600 SW.2d 288, 295 (Tex.Cr.App. 1980), *overruled on other grounds by Janecka v. State*, 739 S.W.2d 813 (Tex. Crim. App. 1987), [the attorney had given no incriminating testimony, and that testimony relating to the "fact" that the witness' client was in a particular city was "harmless" since several others had testified to same].

WITNESSES

GENERAL RULE OF COMPETENCY [FED. R. EVID. RULE 601]

Every person is competent to be a witness except as otherwise provided in these rules.

U.S. v. Ramirez, 871 F.2d 582 (6th Cir. 1989) [severe cocaine addiction making co-conspirator's memory unreliable did not affect competency to testify as competency is matter of status not ability, but would affect witnesses' credibility]; *U.S. v. Cervantes-Pacheco*, 826 F.2d 310 (5th Cir. 1987) [an informant who is compensated on return for testimony is nonetheless competent to testify. However, the defendant may cross-examine the witness on the issue of the credibility of a "purchased" witness].

However, a contingent fee paid to produce evidence against "a particular named defendant as to crimes not yet committed" may render his testimony inadmissible;

See U.S. v. Cervantes-Pacheco, 826 F.2d at 312;

or, where the fee is contingent upon conviction,

See U.S. v. Garcia, 528 F.2d 580, 587 (5th Cir. 1976).

However, in civil actions and proceedings, with respect to an element of a claim or defense as to which State law supplies the rule of decision, the competency of a witness shall be determined in accordance with State law.

HYPNOTICALLY ENHANCED TESTIMONY CANNOT BE AUTOMATICALLY EXCLUDED

Because criminal defendants have a right to testify in their own behalf under the Due Process Clause of the Fourteenth Amendment, the compulsory process clause of the Sixth Amendment, and the Fifth Amendment's privilege against self-incrimination, an accused's hypnotically enhanced testimony cannot be automatically excluded. Instead, the trial court must assess each request for admission of such testimony on a case-by-case basis.

See *Rock v. Arkansas*, 483 U.S. 44, 107 S.Ct. 2704, 97 L.Ed.2d 37 (1987).

Furthermore, where a victim's testimony is hypnotically enhanced procedural safeguards must be used, profiling a state funded expert on hypnosis to an indigent defendant, to ensure a fair trial. At least one court has held that not providing an expert for the defendant resulted in a fundamentally unfair trial and required reversal. *Little v. Armontraut*, 835 F.2d 1240 (8th Cir. 1987).

COMPETENCY OF JUDGE AS WITNESS [FED. R. EVID. RULE 605]

The judge presiding at the trial may not testify in that trial as a witness. No objection need be made in order to preserve the point.

WHO MAY IMPEACH [FED. R. EVID. RULE 607]

The credibility of a witness may be attacked by any party, including the party calling him,

See *U.S. v. Hasenstab*, 575 F.2d 1035 (2d Cir.), cert. denied, 439 U.S. 827 (1978);
U.S. v. Craig, 573 F.2d 513 (7th Cir.), cert. denied, 439 U.S. 820 (1978);
U.S. v. Frappier, 807 F.2d 257 (1st Cir. 1986);

however, counsel may not lead his own witness. FED. R. EVID. Rule 611(c).

The government may not bring on the testimony of a co-defendant for the sole purpose of impeaching him or her so that substantive evidence that would not otherwise be admissible will be heard by the jury under the guise of impeachment. *U.S. v. Peterman*, 841 F.2d 1474 (10th Cir. 1988).

EVIDENCE OF CHARACTER AND CONDUCT OF WITNESS [FED. R. EVID. RULE 608]

OPINION AND REPUTATION EVIDENCE OF CHARACTER

The credibility of a witness may be attacked or supported by evidence in the form of opinion or reputation, but subject to these limitations: (1) the evidence may refer only to character for truthfulness or untruthfulness, and (2) evidence of truthful character is admissible only after the character of the witness for truthfulness has been attacked by opinion or reputation evidence or otherwise. FED. R. EVID. Rule 608(a).

See *U.S. v. Shaw*, 829 F.2d 714 (9th Cir. 1987) [holding that an instruction that the jury should examine the testimony of a witness with great caution cured the error created by the prosecutor's opening statement in which he vouched for the witness' truthfulness].

SPECIFIC INSTANCES OF CONDUCT

Specific instances of the conduct of a witness, for the purpose of attacking or supporting his credibility, other than conviction of crime as provided in Rule 609, may not be proved by extrinsic evidence. They may, however, in the discretion of the court, if probative truthfulness or untruthfulness, be inquired into on cross-examination of the witness (1) concerning his character for truthfulness or untruthfulness, or (2) concerning the character for truthfulness or untruthfulness of another witness as to which character the witness being cross-examined has testified. FED. R. EVID. Rule 608(b).

Although any witness places his character for truthfulness in issue when he takes the stand, the giving of testimony, whether by an accused or by any other witness, does not operate as a waiver of his privilege against self-incrimination when examined with respect to matters which relate only to credibility. *U.S. v. Cluck*, 544 F.2d 195 (5th Cir. 1976) [reversible error to attack witness' credibility by extrinsic evidence of prior arrest that has not resulted in conviction]; *U.S. v. Park*, 525 F.2d 1279 (5th Cir. 1976) [Rule 608(b) not permit cross-examination of defense witness, who testified defendant had not stolen item charged, regarding suspicious air conditioner shipments and pay-offs to the accused]; *U.S. v. Alvarado*, 519 F.2d 1133 (5th Cir. 1975), *cert. denied*, 424 U.S. 1073 (1976) [trial court held to have properly precluded question of prosecution witnesses in marijuana trial regarding their possible prostitution and homosexuality [even though offered to show bias and motive to testify for government] on grounds same was too speculative]; *U.S. v. Banks*, 520 F.2d 627 (7th Cir. 1975); *U.S. v. Wood*, 550 F.2d 435 (9th Cir. 1977) [testimony of Mexican police officer that defendant was wanted in Mexico for auto theft was inadmissible even though it was contrary to defendant's own testimony]; *U.S. v. Dinitiz*, 538 F.2d 1214, 1224 (5th Cir. 1976) (en banc) [must articulate theory of admissibility]; *U.S. v. Curry*, 512 F.2d 1299 (4th Cir. 1975), *cert. denied*, 423 U.S. 832 (1975) [ruling as to "have-you-heards"].

Vigorous cross-examination and/or contradiction by other evidence in the case does not constitute attack of witness' character for truthfulness as predicate for admitting evidence of his truthful character, particularly testimony as to favorable polygraph results already excluded under Rule 403. *U.S. v. Thomas*, 768 F.2d 611 (5th Cir. 1985).

But see U.S. v. Morales-Quinones, 812 F.2d 604 (10th Cir. 1987) [defendant may impeach government witness by cross-examining him about specific instances of conduct not resulting in conviction if conduct is probative of witness' character for truthfulness or untruthfulness].

IMPEACHMENT BY EVIDENCE OF CONVICTION OF CRIME [FED. R. EVID. RULE 609]

For the purpose of attacking the credibility of a witness, evidence that he has been convicted of a crime is admissible only if the crime:

- a. Was punishable by death or imprisonment in excess of one year ...and the court determines that the probative value of admitting this evidence outweighs its prejudicial effect to the defendant, or
- b. Involved dishonesty or false statement, regardless of the punishment.

The Supreme Court has held that, except for criminal defendants (and perhaps defense witnesses), Rule 609(a)(1) requires a judge to permit impeachment of witnesses (including prosecution witnesses in a criminal case) without regard to any resulting unfair prejudice to the witness or the party offering the testimony. *Green v. Bock Laundry Machine Co.*, 490 U.S. 504, 109 S. Ct. 1981, 104 L.Ed.2d 557 (1989).

RE MOTENESS [FED. R. EVID. RULE 609(b)]

A conviction is not admissible if a period of more than ten years has elapsed since the date of the conviction, or release from confinement whichever is later. However, upon notice and a fair opportunity to contest its admission the court may admit same where it determines that its probative value outweighs its prejudicial effect.

See U.S. v. Feliz, 867 F.2d 1068 (8th Cir. 1989) [no "exceptional circumstances" existed to overcome "rebuttable presumption" against admissibility of state convictions].

Entirely separate from these considerations precluding admission of prior convictions, the defendant may be able to exclude same because of prosecutions assurances of non-use regardless of the particulars of the assurances [prosecutor promised not to use to impeach court held same could not be used to show motive or intent]. *See: U.S. v. Shapiro*, 879 F.2d 468 (9th Cir. 1989)[Government's breach of stipulation constituted reversible error as Government stated would not offer evidence of defendant's prior conviction or cross examine him as to that conviction].

FINALITY OF CONVICTION [FED. R. EVID. RULE 609(c)]

Pendency of appeal does not render underlying conviction inadmissible for impeachment purposes.

STATE :

In Texas, only final convictions, not on appeal, are admissible for impeachment purposes. *Cf. Poore v. State*, 524 SW2d 294 (Tex.Cr.App. 1975) [stating that burden on party offering the witness to show conviction not final].

FEDERAL :

FED. R. EVID. Rule 609(e) provides that the "pendency of an appeal ...does not render evidence of a conviction inadmissible." *U.S. v. Rose*, 526 F.2d 745 (8th Cir.), *cert. denied*, 430 U.S. 908 (1977).

DETAILS OF OFFENSE ARE INADMISSIBLE

Tucker v. U.S., 409 F.2d 1291 (5th Cir. 1969); *U.S. v. Bray*, 445 F.2d 178, 182 (5th Cir.), *cert. denied*, 404 U.S. 1002 (1971).

Guilty pleas of Co-Conspirators are only Admissible to show-those co-conspirators credibility admitting instruction must be given to confine what a jury may consider co-conspirator's guilty pleas to aid in determining the credibility of the co-conspirator that entered a plea. These guilty pleas may not be considered as substantive evidence of guilt. *See, e.g., U.S. v. Dunn*, 841 F.2d 1026 (10th Cir. 1988); *U.S. v. Smith*, 806 F.2d 971, 974 (10th Cir. 1986); *U.S. v. Baez*, 703 F.2d 453, 455 (10th Cir. 1983). There is a preference to caution the jury after each co-conspirator testifies. *U.S. v. Dunn*, 841 F.2d 1026 (10th Cir. 1026).

EFFECT OF PARDON, ANNULMENT OR CERTIFICATION OF REHABILITATION [FED. R. EVID. Rule 609(c)]

DISTINCTION BETWEEN STATE AND FEDERAL

State:

In Texas, if the sentence was suspended and then set aside or probation was granted and the term was successfully completed then the conviction is not admissible for impeachment purposes.

However, TEX. R. EVID. 609(c)(3) provides that a pardon does not render a prior conviction inadmissible for impeachment purposes, *Jones v. State*, 147 SW2d 508 (Tex.Cr.App. 1941); unless such pardon is premised upon proof of innocence, *Logan v. State*, 448 SW2d 462 (Tex.Cr.App. 1969).

Federal:

FED. R. EVID. Rule 609(c) provides that a prior conviction is not admissible for impeachment purposes where:

"(1) the conviction has been the subject of a pardon, annulment, certificate of rehabilitation, or other equivalent procedure ...and that person has not been

convicted of a subsequent crime which was punishable by death or imprisonment in excess of one year, or

(2) the conviction has been the subject of a pardon, annulment, or other equivalent procedure based on a finding of innocence."

U.S. v. Wiggins, 566 F.2d 944 (5th Cir. 1978) [defendant apparently has obligation of showing that his release [e.g. from "half-way house"]"...amounted to a finding of rehabilitation"].

MODE OF INTERROGATION [FED. R. EVID. RULE 611]

SCOPE OF CROSS-EXAMINATION [FED. R. EVID. RULE 611(b)]

Cross-examination should be limited to the subject matter of the direct examination and matters affecting the credibility of the witnesses limiting the original draft which allowed cross-examination "...on any matter relevant to any issue in the case", H.R. Rep. No. 93-650, Cong. First Sess. 12.1973.

See also *U.S. v. Haili*, 443 F.2d 1295, 1299 (9th Cir. 1971);
Casey v. U.S., 413 F.2d 1303 (5th Cir. 1969), *cert. denied*, 397 U.S. 1039 (1970);
U.S. v. Evanchik, 413 F.2d 950 (2d Cir. 1969);
U.S. v. Cole, 617 F.2d 151 (5th Cir. 1980) [permitting interrogation outside scope of direct as to witness' credibility].

Limitation on cross-examination held violative of confrontation guaranteed by Sixth Amendment. *U.S. v. Lewis*, 447 F.2d 134 (2d Cir. 1971); *U.S. v. Wolfson*, 437 F.2d 862 (2d Cir. 1970); *U.S. v. Dickens*, 417 F.2d 958 (8th Cir. 1969).

Limitation on cross-examination held not to violate of confrontation clause. *U.S. v. Lara-Hernandez*, 588 F.2d 272 (9th Cir. 1978).

Sixth Amendment guarantees a criminal Defendant the right to "confront" and "cross-examine" adverse witnesses.

"In all criminal prosecutions, the accused shall enjoy the right to ...be confronted with the witnesses against him."

The Sixth Amendment guarantee of confrontation includes the right to cross-examine.

"[A] major reason underlying the Constitutional Confrontation Rule is to give a defendant charged with crime an opportunity to cross-examine the witnesses against him." *Pointer v. Texas*, 380 U.S. 400, 406-07 (1965).

Applicable to States through Fourteenth Amendment. *Pointer v. Texas*, 380 U.S. 400 (1965) [error to admit testimony at preliminary hearing where defendant not represented by

counsel); *Parker v. Gladden*, 385 U.S. 363 (1966) (holding right to confront Bailiff who made disparaging remarks while escorting jury)].

State "Voucher Rule" denied Defendant his Sixth Amendment right of cross-examination. *Chambers v. Mississippi*, 410 U.S. 284 (1973) [defense counsel entitled to cross-examine witness regarding statements against interest even though hearsay].

Right to full and unfettered cross-examination.

Chambers v. Mississippi, 410 U.S. 284 (1973);

Davis v. Alaska, 415 U.S. 308, 94 S.Ct. 1105 (1974) [right to cross-examine key fact witness as to pending juvenile probation to show bias and motive];

U.S. v. Miranda, 510 F.2d 385 (9th Cir. 1975);

Snyder v. Coiner, 510 F.2d 224, 225 (4th Cir. 1975).

The defendant's Sixth Amendment right to confront witnesses was denied where testimony by police officers that a non-testifying co-defendant had given them specific names as those of defendant's accomplices. Admission of such testimony was held not to be plain error because none of the information was crucial to the State's case. *Clark v. Maggio*, 737 F.2d 471 (5th Cir. 1984).

Likewise, the State denied defendant who was charged with illegal transporting of aliens, the right of confrontation by admitting into evidence videotaped depositions of two aliens released at the Mexican border. *U.S. v. Guardian-Salazar*, 824 F.2d 344 (5th Cir. 1987).

But, the defendant has no Sixth Amendment right to attend a witness competency hearing where his attorney is permitted to be present, at least in a child-molestation case where witnesses are children. *Kentucky v. Stincer*, 482 U.S. 730, 107 S.Ct. 2658, 96 L.Ed.2d 631 (1987).

LEADING QUESTIONS [FED. R. EVID. RULE 611(c)]

Rule 611(c) restricts "leading questions" to cross-examination unless "necessary to develop" the witness' testimony, "a hostile witness, an adverse party, or witness identified with an adverse party".

PRIOR STATEMENTS OF WITNESSES [FED. R. EVID. RULE 613]

"Statement need not be shown nor its contents disclosed" to witness when examining him concerning a prior statement, "but on request the same shall be shown to disclose to opposing counsel." [This applies to impeachment of witness with prior inconsistent statement.]

Extrinsic evidence of prior inconsistent statement of witness is not admissible unless the witness is afforded the opportunity to explain or deny same and the opposite party is afforded an opportunity to interrogate him thereon. *U.S. v. DiNapoli*, 557 F.2d 962 (2d Cir.), cert. denied, 434 U.S. 858, 98 S.Ct. 181 (1977). See also *Ex parte Adams*, 767 S.W.2d 438 (Tx.Cr.App. 1989)

[state's failure to disclose prior inconsistent statements by witness whose testimony placed defendant at murder scene deprived defendant of fair trial as disclosure of inconsistent statement took place after conclusion of witness' testimony and both sides had rested].

Caveat: Rule 613 deals with impeachment of a witness with a prior inconsistent statement. 40 ALR Fed. 629 (1978).

The statement would be admissible as substantive evidence of the truth of the matter therein contained, where it satisfies either:

- (1) R. 801(d)(1) Prior statements by a witness
[see hereinafter], or
- (2) R. 801(d)(2) Admission by party opponent [see hereinafter].

See *Hall v. State*, 764 S.W.2d 19 (Tex.App.-Amarillo 1989) [holding that a video tape of a three year old victim of sexual molestation, that was admitted as excited utterances, was also properly used to impeach the child's credibility].

But see *U.S. v. Johnson*, 802 F.2d 1459 (D.C. Cir. 1986) [prosecutor's calling of witness for sole purpose of testimony about witness's previous statement that implicated defendant which was not otherwise admissible was found to be improper].

"There is no authority, in the Federal Rules of Evidence or elsewhere, suggesting that a party may on rebuttal call a witness-who the party knows will not offer any relevant evidence - and then impeach that witness by introducing under FED. R. EVID. 613(b), an earlier, hearsay statement favorably to that party's case. Indeed, the case law is to the contrary. Impeachment evidence is to be used solely for the purpose of impeachment, and it may not be 'employed as a mere subterfuge to get before the jury evidence not otherwise admissible.'" *U.S. v. Johnson*, 802 F.2d at 1466.

BIAS, MOTIVE OR PREJUDICE

A witness may be impeached by showing that his testimony may be motivated by reasons other than telling the truth:

- A. Prior arrests or pending indictment against prosecution witness.

U.S. v. Musgrave, 483 F.2d 327 (5th Cir.), cert. denied, 414 U.S. 1023;
U.S. v. Croucher, 532 F.2d 1042 (5th Cir. 1976);
U.S. v. Garrett, 542 F.2d 23 (6th Cir. 1976);
U.S. v. DeLeon, 498 F.2d 1327 (7th Cir. 1974) [no indictment];

U.S. v. Garcia, 531 F.2d 1303 (5th Cir. 1976), cert. denied, 429 U.S. 941; *Hart v. U.S.*, 585 F.2d 1280 (5th Cir. 1978) ["although the mere existence of an arrest is not admissible to impeach the credibility of a witness, this court has recognized that arrests may be admissible to show that an informer might falsely testify favorably to the Government in order to put his own cases in the best light possible"].

B. Pending probation against prosecution witness;
Davis v. Alaska, 415 U.S. 308, 94 S.Ct. 1105 (1974).

C. No "agreement" or "deal" for the witness' testimony need be shown;
Greene v. Wainwright, 634 F.2d 272, 276 (5th Cir. 1982);
U.S. v. Mayer, 556 F.2d 245, 249 (5th Cir. 1977);
Burr v. Sullivan, 618 F.2d 583, 587 (9th Cir. 1980).

"Whether or not a deal existed is not crucial. What is important is whether the witness may be shading his testimony in an effort to please the prosecution. A desire to cooperate may be formed beneath the conscious level, in a manner not apparent even to the witness, but such a subtle desire to assist the state nevertheless may cloud perception." *Greene v. Wainwright*, 634 F.2d at 276.

Davis v. Alaska, 415 U.S. 308, 315-316 (1965) [holding Sixth Amendment right of confrontation and cross-examination violated by prohibiting cross-examination of prospective witness regarding pending juvenile probation];

U.S. v. Cervantes-Pacheco, 800 F.2d 452 (5th Cir. 1986) [testimony by informant whose fee was in part dependant on ultimate outcome at trial was impermissibly tainted].

D. Prior false testimony by prosecution witness against another defendant in a parallel prosecution; *Johnson v. Brewer*, 521 F.2d 556 (8th Cir. 1975).

E. Extraneous offenses (uncharged misconduct):

However, such other crimes, wrongs, or acts are not admissible to prove the character of a person in order to show that he acted in conformity therewith. Rather for other purposes, such as proof of: MOTIVE, OPPORTUNITY, INTENT, PREPARATION, PLAN, KNOWLEDGE, IDENTITY, OR ABSENCE OF MISTAKE OR ACCIDENT, under FED. R. EVID. Rule 404 (b).

Even if extraneous offense fits within exception it may be excluded where trial court determines unfair prejudice from admission outweighs probative value. FED. R. EVID. Rule 403.

F. Present living arrangements to show reason for fabricating rape story;
Olden v. Kentucky, 488 U.S. 227, 109 S.Ct. 480, 102 L.Ed.2d 513 (1988).

OPINIONS AND EXPERT TESTIMONY

In 2006, the Texas Court of Appeals held that an expert witness may not testify to his opinion on a pure question of law. *Anderson v. State*, 193 S.W.3d 34 (Tex. Crim. App. 2006).

An expert witness may state an opinion on a mixed question of law and fact as long as the opinion is confined to the relevant issues and is based on proper legal concepts. However, an expert witness may not testify to his opinion on a pure question of law. @ *Id.*

One court has held that expert testimony on the typical structure of a mail fraud scheme was admissible to assist jury in understanding operation of scheme and in assessing whether defendant was involved. *U.S. v. McCollum*, 802 F.2d 344 (9th Cir. 1986).

Medicare employees testifying as to various technical Medicare concepts, which went to the heart of the case, should have been qualified as experts because their testimony was based “to significant degree on specialized knowledge acquired over years of experience.” *U.S. v. White*, 492 F.ed 380, 403-04 (6th Cir. 2007).

Testimony based on reports from forensic software, even if it is publicly available, is considered expert testimony and must be qualified as such. *U.S. v. Ganier*, 468 F.3d 920 (6th 2006).

OPINION TESTIMONY BY LAY WITNESSES [FED. R. EVID. RULE 701]

If the witness is not testifying as an expert, his testimony in the form of opinions or inferences is limited to those opinions or inferences which are (a) rationally based on the perception of the witness and (b) helpful to a clear understanding of his testimony or the determination of a fact in issue.

OPINION ON ULTIMATE ISSUE [FED. R. EVID. RULE 704]

Testimony in the form of an opinion or inference otherwise admissible is not objectionable because it embraces an ultimate issue to be decided by the trier of fact. But, an expert witness may not express an opinion on a conclusion of law. *U.S. v. Lueben*, 812 F.2d 179, 184 (5th Cir. 1987) [holding that trial court erred in excluding defendant's expert's testimony on materiality of certain false statements in a financial statement. Whether these statements would influence a loan officer is a factual inquiry, as opposed to whether they are material which is a legal question].

TESTIMONY AS TO ULTIMATE ISSUE

"... FED. R. EVID. 704(b) precludes an experts opinion or inference 'as to whether the defendant did or did not have the mental state or condition constituting an

element of the crimes charged or of a defense thereto.' ...While the distinction may appear to be a fine one, the Advisory Committee explained that the trust of the Rule is to abandon the restriction precluding witnesses from expressing opinions, even on the ultimate issue, as long as the opinions meet the helpfulness requirement."

Query Could the defense obtain an expert as to what innocent citizens sound like on the telephone?

But See *U.S. v. Scop*, 856 F.2d 5 (2d Cir. 1988). In *Scop*, the court stated, "None of our prior cases, however, has allowed testimony similar to [this expert's] repeated use of statutory and regulatory language indicating guilt. For example, telling the jury that a defendant acted as a "steerer" or participated in a narcotics transaction differs from opining that the defendant "possessed narcotics, to wit: heroin, with the intent to sell," or "aided and abetted the possession of heroin with intent to sell, "the functional equivalent of Whitten's testimony in a drug case. It is precisely this distinction, between ultimate factual conclusions that are dispositive of particular issues if believed. . . . and "inadequately explored legal criteria," that is drawn by the Advisory Committee's Note to Rule 704.

See also *Cooper v. Sowders*, 837 F.2d 284 (6th Cir. 1988) [evidentiary rule regarding a law enforcement officers testimony];

U.S. v. Thomas, 768 F.2d 611 (5th Cir. 1985) [polygraph expert may not testify as a character of witness for truthfulness based on the result's of a polygraph test, as same is not in reality "character" testimony under FED. R. EVID Rule 405 or 608].

SCIENTIFIC EVIDENCE-ADMISSIBILITY

FRYE'S INSISTENCE ON GENERAL ACCEPTANCE OF EXPERT (SCIENTIFIC) EVIDENCE REJECTED FOR FEDERAL TRIALS

In *Daubert v. Merrell Dow*, 509 U.S. 579, 113 S. Ct. 2786, 125 L.Ed.2d 469, 480 (1993), the Court held:

Given the Rules' permissive backdrop and their inclusion of a specific rule [702] on expert testimony that does not mention "general acceptance," . . . *Frye* made "general acceptance" the exclusive test for admitting expert scientific testimony. That austere standard, absent from and incompatible with the Federal Rules of Evidence, should not be applied in federal trials. *Daubert*, 509 U.S. 579, 125 L.Ed.2d at 480.

TRIAL JUDGE DETERMINES IF EVIDENCE IS SCIENTIFIC AND HELPFUL

Consequently the Court directed trial judges to make a preliminary inquiry as to whether the proffered testimony is indeed scientific and helpful to the trier of fact. Some of the elements of the *Frye* test assist the judge in answering these questions; however the *Frye* test's reliance on "general acceptance" is not determinative.

Faced with a proffer of expert scientific testimony, then, the trial judge must determine at the outset, pursuant to Rule 104(a), whether the expert is proposing to testify to (1) scientific knowledge that (2) will assist the trier of fact to understand or determine a fact in issue. This entails a preliminary assessment of whether the reasoning or methodology underlying the testimony is scientifically valid and of whether that reasoning or methodology properly can be applied to the facts in issue.

.....

Widespread acceptance can be an important factor in ruling particular evidence admissible, and "a known technique that has been able to attract only minimal support within the community," [cite omitted] may properly be viewed with skepticism.

.....

To summarize: "general acceptance" is not a necessary pre-condition to the admissibility of scientific evidence under the Federal Rules of Evidence, but the Rules of Evidence - especially Rule 702 - do assign to the trial judge the task of ensuring that an expert's testimony both rests on a reliable foundation and is relevant to the task at hand. Pertinent evidence based on scientifically valid principles will satisfy those demands. *Daubert*, 509 U.S. 579, 125 L.Ed.2d at 482, 483, 485.

In *Kumho Tire Co, Ltd. V. Carmichael*, 526 U.S. 137, 110 S.Ct. 1167 (1999) the Court further held that all types of expert testimony are subject to the *Daubert* analysis prior to admission. Thus expert witness testimony and lay opinion are subject to the gatekeeping inquiry by the court.

Thus the testimony and the expert must be reliable and helpful.

But see State v. Williams, Wis, No. 00-3065-CR (June 6, 2002)[defendant's right of confrontation not violated when crime supervisor testified about results form a test performed by a colleague, while admission of the lab report violated the hearsay rule].

DISCRETION TO ADMIT POLYGRAPHS

At least one Court has held that a trial court has "discretion" to admit the results of polygraph tests where same have been "stipulated", or for impeachment or corroboration of trial witnesses, similar to receipt of "character" evidence for "truthfulness".

U.S. v. Piccinonna, 729 F. Supp. 1336, *affd*, 925 F.2d 1474 (11th Cir. 1989) (en banc).

"There is no question that in recent years polygraph testing has gained increasingly widespread acceptance as a useful and reliable scientific tool. Because of the advances that have been achieved in the field which have led to the greater use of polygraph examination, coupled with a lack of evidence that juries are unduly swayed buy polygraph evidence, we agree with those courts which have found that

a per se rule disallowing polygraph evidence is longer warranted. Of course, polygraph is a developing and inexact science, and we continue to believe it inappropriate to allow the admission of polygraph evidence in all situations in which more proven types of expert testimony are allowed...

"The first rule governing admissibility of polygraph evidence is one easily applied. Polygraph expert testimony will be admissible in this circuit when both parties stipulate in advance as to the circumstances of the test and as to the scope of its admissibility....

"The second situation in which polygraph evidence may be admitted is when used to impeach or corroborate the testimony of a witness at trial."

"Whether used to corroborate or impeach, the admissibility of the polygraph administrator's testimony will be governed by the Federal Rules of Evidence for the admissibility of corroboration or impeachment testimony. For example, Rule 608 limits the use of opinion or reputation evidence to establish the credibility of a witness in the following way: "[E]vidence of truthful character of the witness for truthfulness has been attacked by opinion or reputation evidence or otherwise." Thus, evidence that a witness passed a polygraph examination, used to corroborate that witness's in-court testimony, would not be admissible under Rule 608 unless or until the credibility of that witness were first attacked. Even where the above three conditions are met, admission of polygraph evidence for impeachment or corroboration purposes is left entirely to the discretion of the trial judge." *U.S. v. Piccinonna*, 729 F. Supp. 1336, *affd*, 925 F.2d 1474 (11th Cir. 1989) (en banc).

Texas, however, continues to deem polygraph exams inadmissible. In an unpublished memorandum opinion in 2005, the Texas Court of Appeals (Houston 14th Dist.) revisited the issue of whether a trial court abuses its discretion in refusing to admit polygraph evidence.

Texas courts have long held that polygraph evidence is inadmissible for all purposes. *See Tennard v. State*, 802 S.W.2d 678, 683 (Tex. Crim. App. 1991); *Lee v. State*, 455 S.W.2d 316, 321 (Tex. Crim. App. 1970). Appellant invites us to reconsider this issue, citing a decision by the United States Court of Appeals for the Fifth Circuit and a subsequent dissenting opinion by Justice Meyers of the Texas Court of Criminal Appeals. *See United States v. Posado*, 57 F.3d 428 (5th Cir. 1995); *Landrum v. State*, 977 S.W.2d 586 (Tex. Crim. App. 1998) (Meyers, J., dissenting). In *Posado*, the Fifth Circuit held that a per se rule against polygraph evidence is no longer viable in light of *Daubert* and recent advances in polygraph technique. *Posado*, 57 F.3d at 432-33. The Fifth Circuit did not endorse polygraph evidence, but >merely remove[d] the obstacle of the per se rule against admissibility.= *Id.* at 434. Three years after *Posado*,

the Texas Court of Criminal Appeals declined to reconsider its per se rule against the admissibility of polygraph evidence in *Landrum v. State*, 977 S.W.2d at 586. In his dissenting opinion, Justice Meyers argued that Texas should follow the Fifth Circuit in reconsidering polygraph evidence in light of *Daubert*, *Kelly*, and *Posado* and advances in polygraph technique. *Id.* at 586-57. (Meyers, J., dissenting). Since *Landrum*, the Court of Criminal Appeals has suggested that polygraphs may be subject to a *Daubert* analysis, but it has not explicitly overruled the per se rule against admissibility. See *Ross v. State*, 133 S.W.2d 618, 625-26 (Tex.Crim.App. 2004). *Hunter v. State*, 2005 WL 3116478 (Tex. App. Hous. (14 Dist.)).

HEARSAY

HEARSAY EXCEPTIONS

R. 801(c) A STATEMENT IS NOT HEARSAY IF IT IS NOT OFFERED FOR THE TRUTH OF THE MATTERS ASSERTED

U.S. v. Ebens, 800 F.2d 1422 (6th Cir. 1986) [defense offered tape recordings of interviews between prosecutor and state witnesses as evidence of "coaching", not for truth of contents of tapes, and therefore it was not hearsay];

U.S. v. Davis, 673 F. Supp. 252 (N.D. Ill. 1987) [taped statements made by a government informant in the presence of the defendant constituted non-hearsay verbal acts].

801(d) STATEMENTS WHICH ARE NOT HEARSAY:

(1) Prior Statements of witnesses are not hearsay and come in as "substantive evidence" where the declarant testifies, is subject to cross-examination and the statement is:

A. Inconsistent with the witness' testimony and the prior statement was given under oath and subject to the penalty of perjury, *U.S. v. Castro-Ayon*, 537 F.2d 1055 (9th Cir. 1976) ["penalty of perjury" requirement satisfied by interrogation under oath by border patrol], *Mississippi v. Parker*, 514 S.2d 767 (Miss. 1986) [prior courtroom testimony is admissible], or

B. Consistent with the witness' testimony and offered to rebut a charge of "recent fabrication" or improper influence or motive, or

C. Identification of person after perceiving him. *U.S. v. Cueto*, 611 F.2d 1056 (5th Cir. 1980); *U.S. v. Lewis*, 565 F.2d 1248, 1251 (2d Cir.), cert. denied 435 U.S. 973 (1978) [no requirement of same be under oath].

However, when offered against a criminal defendant, such out-of-court identification must comply with Constitutional requirements under the Sixth and Fifth Amendments regarding right to counsel and freedom from unnecessarily suggestive procedures.

See *U.S. v. Wade*, 388 U.S. 218, (1967);
 Stovall v. Denno, 388 U.S. 293 (1967);
 Biggers v. Tennessee, 390 U.S. 404 (1968);
 Kirby v. Illinois, 406 U.S. 682 (1972);
 U.S. v. Ash, 413 U.S. 300 (1973).

But see *U.S. v. Owens*, 484 U.S. 554, 108 S.Ct. 838, 98 L.Ed.2d 951 (1987) [since victim made an identification after perceiving the defendant and was available for cross at trial, thus meeting the technical requirements of 801(d)(1)(C), it was irrelevant that cross was not successful in light of that same victim's post identification amnesia. The court found that the Sixth Amendment was satisfied if the defendant has a full and fair opportunity to bring out the witness' bad memory and other facts tending to discredit his testimony].

ADMISSION OF A PARTY OPPONENT [FED. R. EVID. RULE 801(d)(2)]

A statement offered against a party is admissible where it is:

- A. his own statement,
 U.S. v. Ordonez, 722 F.2d 530, 534 (9th Cir. 1983) [ledgers alleged to contain evidence of possession of cocaine and the testimony interpreting them were not admissions of the defendant where a Government handwriting expert could not identify the author].

- B. a statement he has adopted, or manifested a belief in its truth, or

 U.S. v. Rios Ruiz, 579 F.2d 670 (1st Cir. 1978) [use of police report and grand jury testimony by police officer - held as personal admissions properly admitted against officer];
 U.S. v. Echeverry, 759 F.2d 1451 (9th Cir.1985) [drug agent's testimony concerning alleged co-conspirator's statements regarding knowledge and involvement with South American cocaine trade were not hearsay when offered as necessary background information rather than for the truth of the matter asserted];
 U.S. v. Yarns, 811 F.2d 454 (8th Cir. 1987) [statement to an accomplice-turned-State's-witness that he was a "good liar" held admissible].

See also *U.S. v. Kattar*, 840 F.2d 118 (1st Cir. 1988) [the federal government, including the Justice Dept., is a party opponent which, by submitting documents to other federal courts, "manifested an adoption of belief in" the truth of same and therefore the documents were non-hearsay, admissible].

The court made it very clear that reliance on a particular position by the government, was not merely an admission by the individual prosecutor offering the same previously: "We agree with Justice (then Judge) Stevens that the assertions made by the government in a formal prosecution... 'establish the position of the United States and not merely the views of its agents who participate there.'" *U.S. v. Katter*, 840 F.2d 118 (1st Cir. 1988).

- C. statement by person authorized by him to make a statement concerning the subject, or
- D. statement by his "agent" or "employee", or
- E. statement by a fellow co-conspirator, made during the course and in furtherance of the conspiracy.
- F. statements by "agents" or "employees":

Rule 801(d)(2)(D) provides that a statement offered against a party which is made "by his agent or employee concerning a matter within the scope of his agency or employment, made during the existence of the relationship" is vicariously admissible against the principal. *U.S. v. Buttram*, 568 F.2d 770 (3d Cir.), *cert. denied*, 435 U.S. 995 (1978); *Gagliardi v. Flint*, 564 F.2d 112, 116 (3d Cir.), *cert. denied*, 438 U.S. 904; *Callon Petroleum Co. v. Big Chief Drilling Co.*, 548 F.2d 1174, 1174 n.2 (5th Cir. 1977); *People v. Torres*, 262 Cal.Rptr. 323 (3d Dist. 1989) [an agency relationship found to be existing between defendant and his interpreter so as to admit interpreter's statements as admissions by defendant].

Otherwise statements by a government agent relating to any matter within the scope of his employment and during the existence of his employment should be admissible against the government and even in other unrelated trials, and whether authorized or not.

See U.S. v. American Tel. & Tel Co., 498 F. Supp. 353 (D.D.C. 1980); *U.S. v. Pena*, 527 F.2d 1356 (5th Cir.), *cert. denied*, 426 U.S. 949 [court reversed decision as to whether 'informant' constituted government agent or employee for purposes of vicarious admission under Rule 801 (d)(2)(D), since statement sought to be admitted was allegedly made several months after the transaction there in question and therefore was held not to be within the scope of the agency] .

Contra U.S. v. Kampiles, 609 F.2d 1233, 1246 (7th Cir.), *cert. denied*, 446 U.S. 954 (1980) ["in a criminal prosecution government employees are not considered servants of a party opposed for the purposes of the Admissions Rule" of 801(d)(2)(D)].

Furthermore, such statement under 801(d)(2)(D) would be admissible without regard to whether the declarant is available to testify or not.

See B-W Acceptance Corp v. Porter, 568 F.2d 1179, 1183 (5th Cir. 1978);

Rule v. International Association of Bridge, Structural and Ornamental Ironworkers, 568 F.2d 558, 569 n.17 (8th Cir. 1977).

Accordingly, the requirements of FED. R. EVID. Rule 804(b)(1) that in order to admit former testimony of "a witness at another hearing of the same or a different proceeding" the party offering same must show:

(1) The declarant is not available,

(2) The "party against whom the testimony is now offered ... had an opportunity and similar motive to develop the testimony by direct, cross, or redirect examination" is not controlling. *B-W Acceptance Corp v. Porter*, 568 F.2d at 1183; *Rule v. International Association of Bridge, Structural and Ornamental Ironworkers*, 568 F.2d 558, 569 n.17.

Statement by a co-conspirator of a party during the course and in furtherance of the conspiracy.

STATEMENTS OF CO-CONSPIRATORS

A statement made by a co-conspirator in the furtherance of the conspiracy has long been recognized by the Federal Judiciary as an exception to the "Hearsay Rule", and to the Sixth Amendment right of confrontation as well. *Clune v. U.S.*, 159 U.S. 590, 593 (1895); *Padget v. U.S.*, 283 F.2d 244 (5th Cir. 1960); *Cwach v. U.S.*, 212 F.2d 520 (8th Cir. 1954).

This judicial rule has now been codified in FED. R. EVID. Rule 801(d)(2)(E) which provides in pertinent part that:

"A statement is not hearsay if ...the statement is offered against the party and is ... a statement by a co-conspirator of a party during the course and in furtherance of the conspiracy." [See discussion at Rule 104 (E) herein].

See U.S. v. Scott, 730 F.2d 143, 148 (4th Cir. 1984), *cert. denied*, 105 S.Ct. 572 [must bear sufficient indicia of reliability to satisfy the Confrontation Clause]; *U.S. v. Chindawongse*, 771 F.2d 840 (4th Cir. 1985); *U.S. v. Aguirre Aguirre*, 716 F.2d 253 (5th Cir. 1983) [the testimony of a witness concerning criminal acts prior to dates of the conspiracy charged by the indictment where such evidence was relevant and admissible for proving the existence and purpose of the conspiracy]; *U.S. v. Gotti*, 644 F. Supp. 370 (E.D.N.Y. 1986) [recitation by family members of past activities was "in furtherance" of conspiracy as they were designed to apprise conspirator of progress and induce his assistance]; *U.S. v. Foster*, 711 F.2d 871 (9th Cir. 1983) [a statement after a conspiratorial goal is accomplished is not "during

the course" of the conspiracy, where there was no intent to elicit continuing cooperation by the statement].

But see *U.S. v. H&M, Inc.*, 562 F. Supp. 651 (M.D.Pa. 1983) [defendant need not have been a member of a conspiracy at the time the statement was made]; *U.S. v. Carroll*, 860 F.2d 500 (1st Cir. 1988) [the acquittal of an alleged co-conspirator did not retroactively invalidate a ruling that his statements were admissible against the defendant; the district court applied the correct test in finding that the statements were admissible, and the acquittal did not change the result].

For standard under which such statements are admissible; see discussion regarding Rule 104 Supra.

NOT WITHIN CO-CONSPIRATOR EXCEPTION

See *U.S. v. Arroyo*, 805 F.2d 589 (5th Cir. 1986) [statement not within furtherance of conspiracy, not curable once admitted and not harmless error; new trial required].

HEARSAY EXCEPTIONS

Availability of Declarant Immaterial [FED. R. EVID. Rule 803]

The following are not excluded by the hearsay rule, even though the declarant is available as a witness:

- (1) Present sense impression,
Harris v. State, 736 S.W.2d 166 (Tex.App.- Houston [14th Dist.] 1987) [testimony by a burglary victim that a neighbor came to the door and announced that she had just seen the defendant running with the victim's radio was admissible as a present sense impression],
- (2) Excited utterance,
- (3) Then existing mental, emotional, or physical condition,

But see *U.S. v. Rodriguez-Pando*, 841 F.2d 1014 (10th Cir. 1988) [defendant's tape recorded statements to police claiming coercion were not admissible as tape offered to prove truth of the matter asserted was hearsay and lacked guarantees of trustworthiness necessary to fit under state of mind exception].

- (4) Statements for purposes of medical diagnosis or treatment,

- (5) Recorded recollection (concerning a matter about which a witness once had knowledge but now has insufficient recollection),
- (6) Records of regular conducted activity:
 - (a) made at or near the time,
 - (b) from information transmitted by a person with knowledge,
 - (c) kept in course of regularly conducted business activity,
 - (d) regular practice to make the report or entry,
 - (e) by testimony of "custodian" or other qualified witness.

Unless the source of information or method of accumulation indicate a lack of trustworthiness.

See *U.S. v. Long*, 578 F.2d 579 (5th Cir.), 439 U.S. 915 (1978) [holding that N.C.I.C. "rap sheets" are not admissible as business records under FED. R. EVID. Rule 803(b)];
U.S. v. Shiver, 414 F.2d 461, 464 (5th Cir. 1969) [stating police reports not admissible as business records];
U.S. v. Johnson, 413 F.2d 1396 (5th Cir. 1969).

See also *U.S. v. Robinson*, 700 F.2d 205 (5th Cir. 1983)[notes of county purchasing agent are inadmissible because it was not part of his official function to take and keep such notes];
U.S. v. Ordonez, 722 F.2d 530, 534 (9th Cir. 1983) [a suspected narcotics ledger was inadmissible as a business record because no foundation was laid regarding the custodian or other witness with knowledge of the circumstances];
Aldridge v. State, 732 SW2d 395 (Tex.App.-Dallas, 1987) [admission of jail fingerprint cards for record purposes only];
U.S. v. Puente, 826 F.2d 1415 (5th Cir. 1987) [entries of license plate numbers by customs officers as vehicles enter the U.S. were admissible as public records because the matters observed were not at the scene of a crime or criminal activity].

- (7) Absence of such "business" record,
- (8) Public records and reports,
- (9) Records of vital statistics,
- (10) Absence of public record or entry,
- (11) Records of religious organizations,
- (12) Marriage, baptismal and similar certificates,

- (13) Family records,
- (14) Records of documents affecting an interest in property,
- (15) Statements in documents affecting an interest in property,
- (16) Statements in ancient documents,
- (17) Market reports, commercial publications,
- (18) Learned treatises,
- (19) Reputation concerning personal or family history,
- (20) Reputation concerning boundaries or general history,
- (21) Reputation as to character,
- (22) Judgment of previous conviction,
- (23) Judgment as to personal, family or general history, or boundaries,
- (24) Other exceptions,

Catch-all, admitting hearsay within the trial courts discretion where such statement:

- (a) has equivalent circumstantial guarantees of trustworthiness (as other exceptions),
- (b) is offered as evidence of material facts,
- (c) is more probative on the point for which it is offered than any other evidence which proponent can reasonably produce,
- (d) is made known to the adverse party:
 - (A) in advance of the trial or hearing with opportunity to object,
 - (B) particulars of statement,
 - (C) name and address of declarant.

See Ricciardi v. Children's Hospital Medical Center, 811 F.2d 18 (1st Cir. 1987) [unknown source of information suggesting untrustworthiness of note precludes it from being admissible under recorded recollection, record of regular conducted activity or the residual exception to hearsay rule].

DECLARANT UNAVAILABLE [FED. R. EVID. RULE 804]

As to exceptions to the hearsay rule applicable where the declarant is "unavailable", the definition of "unavailable" includes situations where the declarant:

1. is exempted by ruling of the court on ground of privilege,
2. persists in refusing to testify despite court order,
3. testifies to lack of memory,
4. is unable to be present or to testify at the hearing because of death or physical or mental illness, or
5. is absent for the hearing and the proponent of his statement has been unable to produce his attendance by process or other reasonable means, *Barker v. Page*, 390 U.S. 719, 723-24 (1968) [requiring every reasonable effort to obtain live testimony].

The following are not excluded by the hearsay rule, where the declarant is "unavailable".

1. Former testimony of witness at another hearing of the same or different proceeding ...if the party against whom the testimony is now offered ...had an opportunity and similar motive to develop the testimony by direct or cross- examination.

2. Statement under belief of impending death,
3. Statement against interest at the time of making is so far contrary to declarant's:
 - (a) pecuniary,
 - (b) proprietary,
 - (c) civil liability,
 - (d) criminal liability;
statements against penal interest,

See *U.S. v. Candoli*, 870 F.2d 496 (9th Cir. 1989);
U.S. v. Lieberman, 637 F.2d 95, 103 (2d Cir. 1980);
U.S. v. Mock, 640 F.2d 629, 631-2 (5th Cir. 1981);

Cf. *U.S. v. L'Hoste*, 640 F.2d 693, 695-96 (5th Cir. 1981) [statement not admissible as statement against penal interest where made after guilty plea and at civil proceedings to further his pecuniary interest, such as reasonable man would not have made statement unless he believed it to be true].

U.S. v. Sarmiento-Perez, 667 F.2d 1239 (5th Cir. 1980), cert. denied, 103 S.Ct. 77;

U.S. v. Gonzalez, 559 F.2d 1271, 1273 (5th Cir. 1977).

The same requirements apply to statements against penal interest regardless of whether offered by prosecution or defense. *Lyons v. U.S.*, 514 A.2d 423 (D.C. App. 1986).

4. Statement of personal or family history, and
5. Catch-all, admitting hearsay within the trial courts discretion where such statement:
 - (a) has equivalent circumstantial guarantees of trustworthiness (as other exceptions),
 - (b) is offered as evidence of material fact,
 - (c) is more probative on the point for which it is offered than any other evidence which proponent can reasonably produce,
 - (d) is made known to the adverse party:
 - (i) in advance of the trial or hearing with opportunity to object,
 - (ii) particulars of statement,
 - (iii) name and address of declarant.

See, e.g., Brown v. Dugger, 831 F.2d 1547 (11th Cir. 1987) [the requirements of the residual exception were not met where a declarant who is not shown unavailable and whose statement is not shown reliable, such a witness must be produced to afford the defendant the right to compulsory process regardless of the fact that the defendant was present and silent at the time the incriminating statement was made].

Additionally, even if evidence meets one of the enumerated exceptions to the hearsay rule, same may be rendered inadmissible.

The Advisory Committee notes also expressly recognize that the exemptions from the exceptions to the hearsay rule set out in Rule 801, 803 and 804, "Do not purport to deal with questions of the right of confrontation". FED. R. EVID. Advisory Comm. Notes, Rule 804(b)(3); FED. R. EVID. Rule 801. *See also Proposed Rules of Evidence* , 56 F.R.D. 183 (1972); *U.S. v. Williams*, 431 F.2d 1168 (10th Cir. 1972), *aff'd*, 477 F.2d 1285 (en banc), *cert. denied*, 405 U.S. 954.

COMPULSORY PROCESS OF DEFENSE WITNESSES

Sixth Amendment "compulsory process clause" guarantees a defendant the right to have the attendance and testimony of witnesses in his behalf. *Chambers v. Mississippi*, 410 U.S. 284, 302 (1973) [overturning state "voucher" rule]; *Webb v. Texas*, 409 U.S. 95, 97-98 (1972) [judges unnecessarily strong admonition regarding perjury law had effect of exerting "such duress on the witness' mind as to preclude him from making a free and voluntary choice whether or not to testify"]; *U.S. v. Bailey*, 834 F.2d 219 (1st Cir. 1987) [defendant accused of trying to bribe a juror should not be denied the chance to interview other members of the jury panel to ascertain the character of the juror making the accusation].

Admonition to defense witness by court or prosecution which interferes with witness' "free and unhampered determination . . . as to whether to testify and if so as to the content of such testimony" constitutes a deprivation of the defendant's Sixth Amendment right to "compulsory process". *Webb v. Texas*, 409 U.S. 95 (1972) [noting court's admonition]; *U.S. v. Thomas*, 488 F.2d 334 (6th Cir. 1973) [noting government agent's admonition]; *U.S. v. Morrison*, 535 F.2d 223, 228 (3d Cir. 1976) [noting prosecutor's admonition]; *U.S. v. Henricksen*, 564 F.2d 197 (5th Cir. 1977) [noting plea bargain of co-defendant included promise not to testify].

IMMUNITY FOR DEFENSE WITNESSES

Some courts have recognized the defendant's right to compulsory testimony under a grant of immunity under certain limited circumstances, where:

- (1) the witness' testimony is essential to an effective defense,
- (2) the witness is available to testify,
- (3) the testimony sought is "clearly exculpatory", and
- (4) there is no showing of "strong governmental interests" against the immunity grant,

U.S. v. Morrison, 535 F.2d 223 (3d Cir. 1966);
U.S. v. DePalma, 476 F. Supp. 775 (S.D.N.Y. 1979).

See also *Herman v. U.S.*, 589 F.2d 1191 (3d Cir. 1978), *cert. denied*, 441 U.S. 913 (1979);
U.S. v. Straub, 538 F.3d 1147 (9th Cir. 2008) (defendant need not demonstrate that the government denied the witness immunity with the intention of distorting the fact-finding process)

Cf. *U.S. v. Yates*, 524 F.2d 1282, 1286 (D.C. Cir. 1975) [the government's obligation to assure the defendant's right to confrontation a grant of use immunity to witness' whose hearsay statements are offered after they invoke their Fifth Amendment privilege];
Simmons v. U.S., 390 U.S. 377 (1968) (immunizing defendant's testimony at suppression hearing).

Contra *U.S. v. Gleason*, 616 F.2d 21, 28 (2d Cir.), *cert. denied*, 444 U.S. 1083 (1980);
U.S. v. Lenz, 616 F.2d 960 (6th Cir.), *cert. denied*, 447 U.S. 929 (1980);
U.S. v. Graham, 548 F.2d 1302, 1315 (8th Cir. 1977);
U.S. v. Heldt, 668 F.2d 1238 (9th Cir. 1981).

It would appear same is still an open question in the Fifth Circuit.
See *U.S. v. Herbst*, 641 F.2d 1161, 1168-9 (5th Cir. 1981);
U.S. v. Beasley, 550 F.2d 261, 268 (5th Cir. 1977);
U.S. v. D'Apice, 664 F.2d 75 (5th Cir. 1981).

Under certain circumstances a defendant is entitled to a severance in order to provide necessary testimony of his co-defendant.

See *U.S. v. Grapp*, 653 F.2d 189 (5th Cir. 1981);
U.S. v. Butler, 611 F.2d 1066, 1071 (5th Cir.), *cert. denied*, 101 S.Ct. 97 (1981).
See also *U.S. v. Martinez*, 486 F.2d 15 (5th Cir. 1973);
Byrd v. Wainwright, 428 F.2d 1017 (5th Cir. 1970);
U.S. v. Shuford, 454 F.2d 772 (4th Cir. 1971);
U.S. v. Gleason, 159 F. Supp. 282 (S.D. N.Y. 1966).

The Fifth Circuit has recently set out the criteria for demonstrating such a need for such severance as would qualify under FED. R. CRIM. P. Rule 14 "compelling prejudice" standard:

"One seeking a severance on the grounds that he needs the testimony of a co-defendant must demonstrate:

- (1) a bona fide need for the testimony;
- (2) the substance of the testimony;
- (3) its exculpatory nature and effect; and
- (4) that the co-defendant will in fact testify if the cases are severed."

U.S. v. Grapp, 653 F.2d at 193.

It has been held that as between the two, a witness' Fifth Amendment right to remain silent takes precedence over defendant's Sixth Amendment right to compel his testimony. *U.S. v. Goodwin*, 625 F.2d 693 (5th Cir. 1980). However, a defendant who is able to present a strong exculpatory evidence that another person committed the offense the defendant is charged with, the defendant may be entitled to have the court compel the witness to take the stand to invoke the Fifth Amendment in front of the jury. *State v. Whitt*, 649 S.E.2d 258 (W.Va. 2007). This is an exception to the general rule against calling a witness to the stand solely for the purposes of invoking the privilege.

It is also worth mentioning that the Supreme Court has recently held that the state cannot restrict efforts by defendants in death penalty cases to blame a third party by requiring the court evaluate the strength of the prosecution and defense evidence. *Holmes v. South Carolina*, 547 U.S. 319 (2006).

Where a witness seeks to be excused from testifying on the basis that his testimony will violate his Fifth Amendment privilege against self-incrimination, the Fifth Circuit has developed the practice whereby, outside the presence of the jury, the trial judge examines the witness to determine whether reasonable grounds exist to uphold the privilege. *U.S. v. Goodwin*, 608 F.2d 147 (5th Cir. 1980).

It is the assertion of the privilege coupled with the court's in camera determination that will exonerate a witness from testifying. *U.S. v. Sheikh*, 654 F.2d at 1072.

To sustain the privilege and excuse a witness from testifying the court must find that the claimant, "is confronted by substantial and real ...hazards of incrimination". *U.S. v. Apfelbaum*, 445 U.S. 115 (1980). Where the witness answers "might be used against him in any subsequent criminal proceeding, invocation of the Fifth Amendment privilege would justify excusing the testimony. *In re Corregated Container Antitrust Litigation*, 644 F.2d 70 (5th Cir. 1981).

As the Supreme Court noted in *Hoffman v. U.S.*, 341 U.S. 479 (1951), "to sustain the privilege, it need only be evident from the implications of the question ...that a responsive answer ...might be dangerous because injurious disclosure could result". See also *U.S. v. McCloskey*, 682 F.2d 468 (4th Cir. 1982) [for hearsay exception purposes a witness must properly claim a Fifth Amendment privilege and such claim must be sustained by the Court before such witness is considered unavailable].

JUDGE MAY NOT COMMENT ON THE WEIGHT OF THE EVIDENCE CONSIDERED

Texas Code of Criminal Procedure 38.05 states that In ruling upon the admissibility of evidence, the judge shall not discuss or comment upon the weight of the same or its bearing in the case, but shall simply decide whether or not it is admissible; nor shall he, at any stage of the proceeding previous to the return of the verdict, make any remark calculated to convey to the jury his opinion of the case. Tex. C. Crim. Pro. 38.05. But, in order to be grounds for reversal, the court=s remark must be material to the case. *Simon v. State*, 2006 WL 2771796 (Tex. App.BHous. (14 Dist.)). A defendant=s right is harmed when the judge=s comment Ahad a substantial and injurious effect or influence in determining the jury=s verdict. @ *Id.* To determine whether the error was harmful, the Court of Appeals in *Simon* decided that the court must consider everything in the record, and Aask if a reasonable probability exists that the error moved the jury from a state of non-persuasion to one of persuasion beyond a reasonable doubt. @ *Id.* In *Simon*, a DWI case, the Court of Appeals found that the even though the trial court did not intend any adverse consequences, his comments could in fact be found to influence the jury toward the State=s

position regarding the Intoxilyzer used to test Simon's breath. *Id.* The trial courts comments, taken as a whole, demanded reversal and warranted a new trial. *Id.*

A NOTE ON EVIDENCE CONSIDERED AT SENTENCING

In 2006 the U.S. Supreme Court was asked to consider the issue of whether the State may limit the innocence-related evidence he can introduce at that proceeding to the evidence he introduced at his original trial. *Oregon v. Guzek*, 126 S.Ct. 1226, 1228 (2006). In *Guzek*, the defendant was convicted of capital murder and sentenced to death. *Id.* Guzek's defense rested mainly on two alibi witnesses, his grandfather and his mother, who testified that he was with "one or the other." *Id.* At the sentencing phase, Guzek sought to introduce testimony from his mother that she was with him on the night in question. The Court considered this to be new evidence, which went to whether he did the crime, not how he did it.

The Eighth Amendment insists that a sentencing jury be able to consider mitigating evidence about the defendant so that if it imposes the death penalty, it is the appropriate punishment. *Id.* The Supreme Court held that nothing in the Eighth or Fourteenth Amendments...provides a capital defendant a right to introduce new evidence of this kind at sentencing. *Id.* Thus, a State may set limits on what evidence a defendant may submit at sentencing, as long as the limits are reasonable, and the State may control the manner that the evidence is submitted. *Id.* The Court reasoned that the Eighth Amendment does not require evidence aimed at casting a residual doubt on the defendant's guilt because it would only be inconsistent with the conviction assessed at the guilt phase of trial.