Strafford

Presenting a live 90-minute webinar with interactive Q&A

Admitting Hearsay and Applying FRE 801(d)(2): Expanding the Scope of Party Admissions to Outside Counsel Statements

TUESDAY, JUNE 9, 2020

1pm Eastern | 12pm Central | 11am Mountain | 10am Pacific

Today's faculty features:

Michael F. Bachner, Partner, **Bachner and Weiner**, New York

Thad K. Jenks, Partner, **Weinstein Tippetts & Little**, Houston

Timothy S. Tomasik, Founding Member, **Tomasik Kotin Kasserman**, Chicago

The audio portion of the conference may be accessed via the telephone or by using your computer's speakers. Please refer to the instructions emailed to registrants for additional information. If you have any questions, please contact **Customer Service at 1-800-926-7926 ext. 1**.

Tips for Optimal Quality

FOR LIVE EVENT ONLY

Sound Quality

If you are listening via your computer speakers, please note that the quality of your sound will vary depending on the speed and quality of your internet connection.

If the sound quality is not satisfactory, you may listen via the phone: dial **1-877-447-0294** and enter your **Conference ID and PIN** when prompted. Otherwise, please **send us a chat** or e-mail **sound@straffordpub.com** immediately so we can address the problem.

If you dialed in and have any difficulties during the call, press *0 for assistance.

Viewing Quality

To maximize your screen, press the 'Full Screen' symbol located on the bottom right of the slides. To exit full screen, press the Esc button.

Continuing Education Credits

FOR LIVE EVENT ONLY

In order for us to process your continuing education credit, you must confirm your participation in this webinar by completing and submitting the Attendance Affirmation/Evaluation after the webinar.

A link to the Attendance Affirmation/Evaluation will be in the thank you email that you will receive immediately following the program.

For additional information about continuing education, call us at 1-800-926-7926 ext. 2.

Program Materials

FOR LIVE EVENT ONLY

If you have not printed the conference materials for this program, please complete the following steps:

- Click on the link to the PDF of the slides for today's program, which is located to the right of the slides, just above the Q&A box.
- The PDF will open a separate tab/window. Print the slides by clicking on the printer icon.

Properly Applying FRE 801(d)(2)(D) to Admit Party Statements of an Agent & Expanding the Scope to Statements of Outside Counsel

Timothy S. Tomasik

TKK
Tomasik Kotin Kasserman
Trial Lawyers

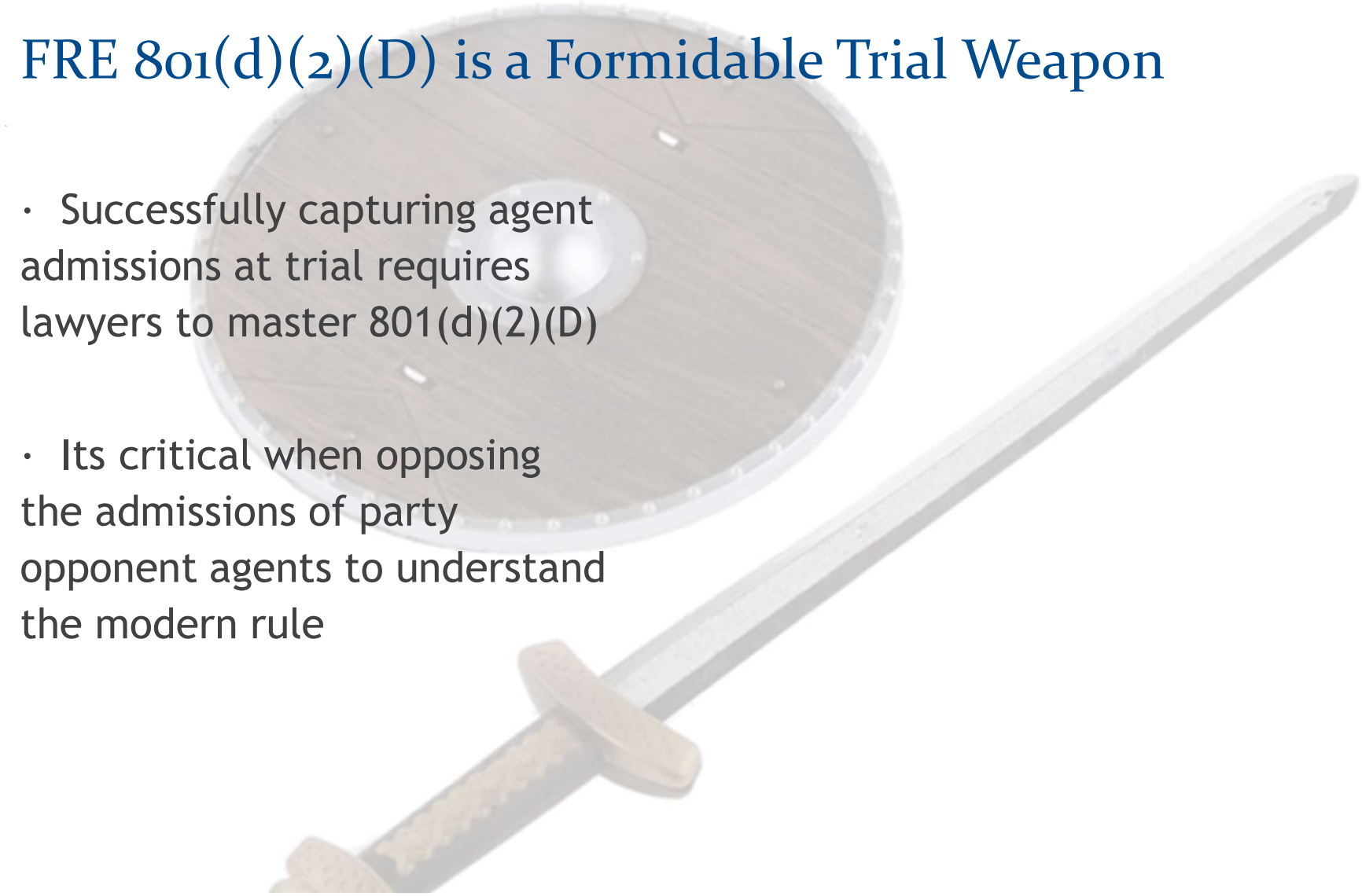
Thad K. Jenks

Weinstein Tippetts & Little LLP
National Trial Attorneys
Based in Houston, Texas

Michael F. Bachner

B&A
Bachner & Associates, P.C.
Attorneys At Law

FRE 801(d)(2)(D) is a Formidable Trial Weapon



- Successfully capturing agent admissions at trial requires lawyers to master 801(d)(2)(D)

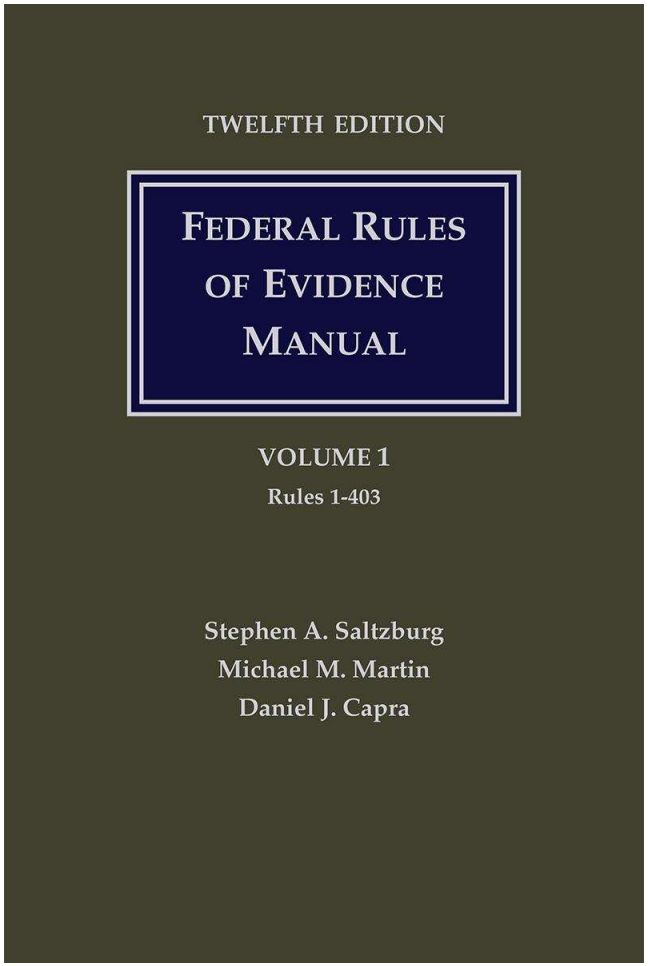
- Its critical when opposing the admissions of party opponent agents to understand the modern rule

Statements of A Party Opponent or Agent of Party Opponent Are Not Hearsay!

Rule 801(d)(2)(D)

"… a statement is **NOT** hearsay if 'the statement is offered against an opposing party and was made by the party's agent or employee on a matter within the scope of that relationship and while it existed.'"

Saltzburg – Federal Rules of Evidence Manual



A Statement Need Not Be Against Interest

Any statement made by or on behalf of a party generally may be admitted into evidence as an admission by a party opponent if a statement is relevant to a trial issue.

Admissible when they **"tend"** to prove or disprove the existence of facts they have the tendency to establish.

Nastasi v. United Mine Workers, 209 Ill. App. 3d 830 (1991)

Availability of Witness Immaterial

- It is not necessary the person making an admission be unavailable

- Admissions – Deposition Answers – are offered as admissions. No predicate foundation is required for use in direct as substantive evidence

Adams v. Family Planning Associates Medical Group, Inc., 315 Ill. App. 3d 533 (2000)

Security SAB and Loan, 77 Ill. App. 3d 610 (1979)

Party Defendant Available?

Federal & State Law – Is Clear the Availability of Witnesses Does Not Ban Publication

Security Sav. And Loan Ass'n. v. Commissioner of Sav. And Loan Association

The Common Law Rule - Abandoned

Impermissible under common law to admit that damaging admission of employee who had no personal knowledge, or

Was not authorized to speak on behalf of employers

Reason: unfair to bind principal – employees not hired to make harmful statements

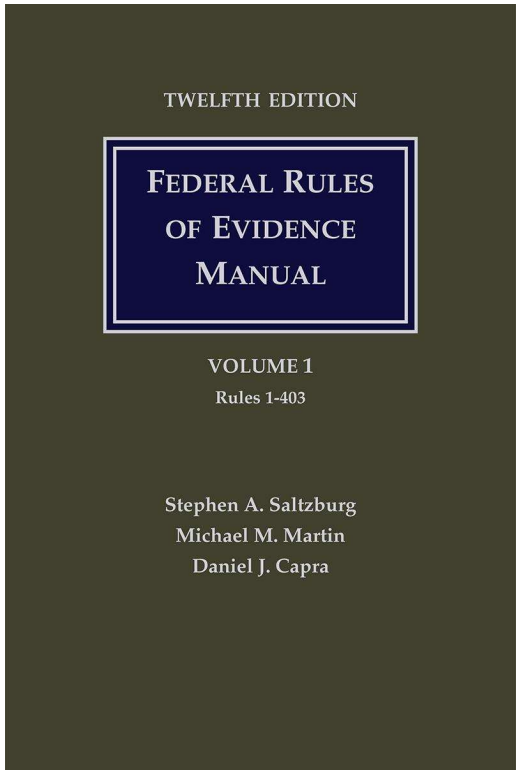
Common Law Approach Imposed an Impossible Burden on Proponents

Courts could not envision a set of facts where an employee was specifically authorized to make a statement detrimental to employer/principal

Rules on admissions are not based on reliability and do not require personal knowledge. **Admissions are a by-product of our adversarial system of justice** and dissatisfaction with unjust outcome let Courts to abandon old principles governing the admission of employee statements in favor the new ones that promoted the generous treatment of statements

4 Steven A. Saltzburg et al., Federal Rules of Evidence Manual § 801.02[6] [f][i] (Matthew Bender 10th ed.)

No Predicate Personal Knowledge Required



"Unlike other rules of evidence, rules on admissions are not based on reliability and do not require personal knowledge. Admissions are a by-product of our adversarial system of justice."

Saltzburg on Evidence; *Security Sav. And Loan Ass'n. v. Commissioner of Sav. And Loan Association*

Objection! Witness Has No Knowledge

Tension between personal knowledge requirement of Rule 602 and statements by a party opponent admissions under Rule 801(d)(2)(D)

Fed. R. Evid. 801 advisory committee's note

Advisory Committee's Notes on Personal Knowledge

The freedom for which admissions have enjoyed from technical demands of searching for an assurance of trustworthiness in "statement against-interest" circumstance, and from the restrictive influences of the opinion rule and rule requiring firsthand knowledge, when taken with the apparently prevalent satisfaction with the results, calls for generous treatment of this avenue to admissibility.

Fed. R. Evid. 801 advisory committee's note

A Modern Consensus

We have now come to a virtual consensus that Rule 801(d)(2)(D) does not require personal knowledge or the authority to speak on behalf of the principal or employer.

Courts recognize that employers did not hire agents to make damaging statements

Courts are now a general agreement that the rule does not mandate the personal knowledge that "no guarantee of trustworthiness is required in the case of agent admissions."

Fed. R. Evid. 801(d)(2)(D) advisory committee's note

Foundation for Agent Admissions

- Declarant was agent of party-opponent;
- Declarant made the statement while he or she was an agent;
- The statement related to the agent's employment duties;
- Opinions and conclusions admissible;
- The statement is inconsistent with the position that the party opponent is taking at trial; the statement is logically relevant to an issue the proponent has a right to prove at trial.

FRE 801(d)(2)(D) Edward J. Imwinkelreid, *Evidentiary Foundations* § 10.03 (2012)

Pavlik v. Walmart Stores, 323 Ill. App 3rd 1060 (2001)

Trial Court barred statements and granted SJ for Defendant.

Plaintiff testified she slipped on liquid that she believed to be hair conditioner.

Clerk said, “Should have cleaned up before,” and “Oh, she was supposed to clean that up and she didn’t.”

Employee never identified.

Some evidence.

Foundation – Can the Q&A Be Published?

The question posed is also published to provide context for the admission.

Foundation For Admission?

· When excerpts from a deposition are offered as admissions, no predicate foundation is required for their use as direct and substantive evidence

· Generally – testimony in a discovery deposition is held to be an evidentiary admission.

Vincent v. Wesolowski

Security Sav. And Loan Ass'n. v. Commissioner of Sav. And Loan Association

Agency – Move *In Limine*

Encourage Court to find by a preponderance of the evidence that the statement was made by an agent or employee against who the statement is offered. Concerning a matter that was within the scope of the agency or employment relationship.

Make A Good Record!

"In making this finding, I've considered the contents of the statement and also the additional evidence relied upon by the parties. The statement therefore [is or is not] admissible as an agent's admission under Rule 801(d)(2)(D)."

Saltzburg, *supra*, § 801.02[6][f][i].

Judges Love Cautionary & Limiting Instructions

Single Defendant

- One party is permitted to present as evidence statements made by another party. You may give these statements the same weight as trial testimony.

Multi-Defendant

- One party is permitted to present as evidence statements made by another party. Each party is responsible, however, only for its own statements. You must be sure to use statements that one party offers against another only against the party who actually made the statement. No other party is responsible for these statements, and these statements may not be used as evidence against any other party.

IRE 104 and 105

Big Picture – Hearsay Rule

The Problem

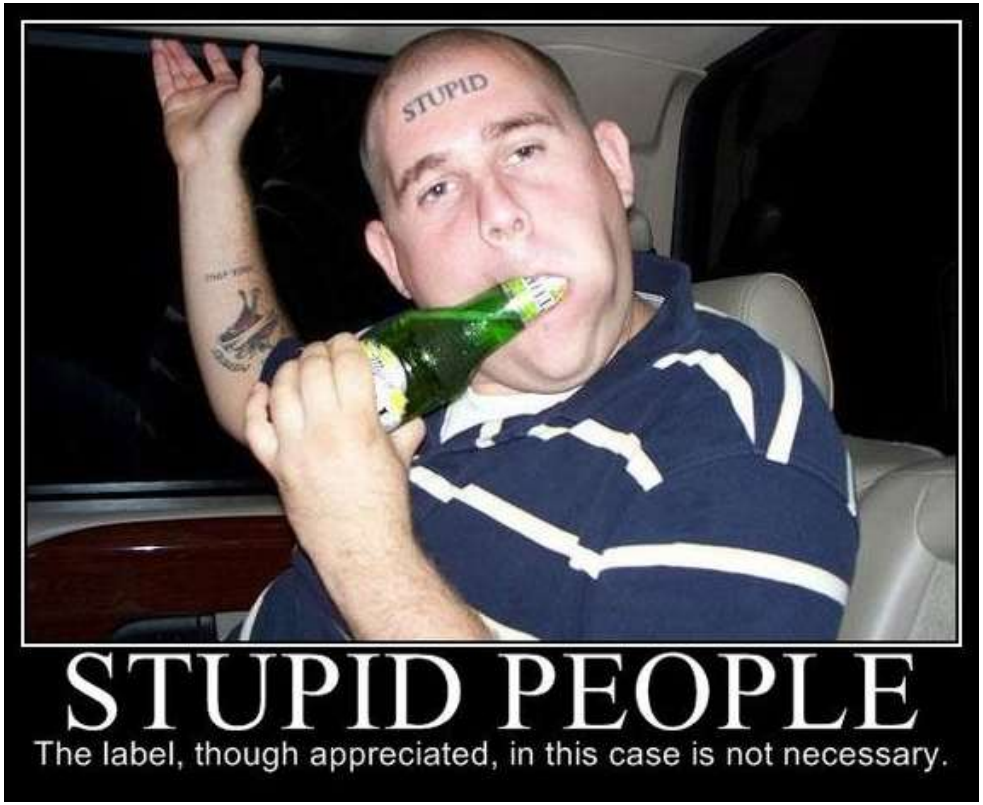
Our Goal: Truthful, Complete Evidence

vs.

The Source of Our Evidence: Humans

Big Picture – Hearsay Rule

VS.



Big Picture – Hearsay Rule

Solution for in-court testimony:

- Oath; penalty of perjury
- Personal knowledge
- Restrictions on opinions
- Jury looks the witness in the eye
- Cross-examination

We consider these to be guarantees of trustworthiness

Big Picture – Hearsay Rule

Problem with out-of-court statements

- Faulty perception
- Faulty memory
- Inadvertent miscommunication
- Insincere miscommunication

Few guarantees of trustworthiness, so generally inadmissible

Big Picture – Party-Opponent Admissions

We admit admissions of a party-opponent because:

- Declarant faces the consequences of own statements regardless of reliability, lack of knowledge
    - Declarant becomes a guarantor of the statement
    - Declarant will not be heard to say his statement was not trustworthy
- Declarant in courtroom to testify and rebut or explain
- Admitting the statement is a by-product of the adversarial system

Big Picture – Party-Opponent Admissions

No longer concerned about reliability:

- No guarantees of trustworthiness needed
- No personal knowledge requirement
- Restrictions on lay opinions lifted

Only two requirements to admit statement of party-opponent:

- Made by the party
    - Is a statement by the party's attorney considered the party's statement?
- Admitted against the party who made the statement

Do Not Confuse with Judicial Admissions

We are discussing an attorneys' evidentiary admissions

We are not discussing judicial admissions:

- A stipulation or formal admission in pleadings which have the effect of withdrawing a fact from issue and dispensing with the need of proof on that fact
- Can be made in pleadings, briefs, oral argument, statements during trial
- Only applies to statements in the same case

If not a judicial admission, then it is likely an evidentiary admission admissible under Rule 801(d)(2)

Problems with Admitting Attorney Admissions

Admitting attorney statements can infringe on important policy concerns or constitutional rights:

- Right to counsel of own choosing
- Right to effective assistance of counsel
- Self-incrimination
- Impeachment by prior conviction
- Inhibit plea negotiations
- Relevance, confusion, prejudice
- Burdens attorney-client relationship

Problems with Admitting Attorney Admissions – Right to Counsel of Client's Choosing

Problems with Admitting Attorney Admissions – Right to Counsel of Client's Choosing

- Attorney who made statement will likely be disqualified
- Concern not implicated when:
    - Lawyer who made statement does not represent client at trial
    - The lawyer would not have represented the client at the trial but for the statement
- Some courts have restricted admission of the attorney's statement to rebuttal only
    - Allows client to choose between making argument to which the statement serves as rebuttal and keeping his counsel

Problems with Admitting Attorney Admissions – Right to Effective Assistance of Counsel

Problems with Admitting Attorney Admissions – Right to Effective Assistance of Counsel

Admitting the attorney statement can chill legitimate advocacy

- It can cause counsel to alter or refrain from making arguments

But:

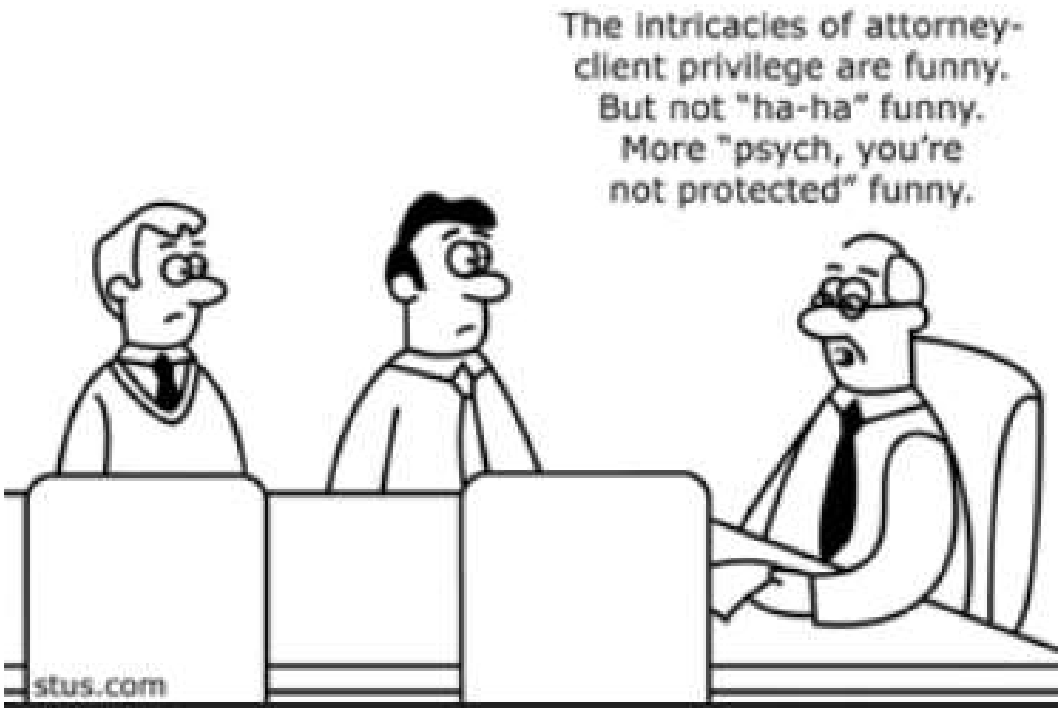
- Revealing a failed litigation tactic does not chill advocacy

Problems with Admitting Attorney Admissions – Right Against Self-Incrimination

Problems with Admitting Attorney Admissions – Right Against Self-Incrimination

- Admitting an attorney statement implicates self-incrimination because it may force the client to choose between:
    - Testifying to explain the statement
    - Not testifying and not explaining the statement
- Becomes a reason to refuse admission only if:
    - It will force the client to take the stand
- Having to present a competing explanation to the jury is not enough impairment of the right against self-incrimination

Problems with Admitting Attorney Admissions – Invasion of Attorney-Client Privilege



Problems with Admitting Attorney Admissions – Invasion of Attorney-Client Privilege

- The fact of representation can reveal the client's motive for seeking legal advice
    - Normally protected by attorney client privilege
- Court hinted this might be enough to keep the statement out of evidence, but did not rule on it, saying it was waived in the trial court

Problems with Admitting Attorney Admissions – Inhibits Plea Negotiations

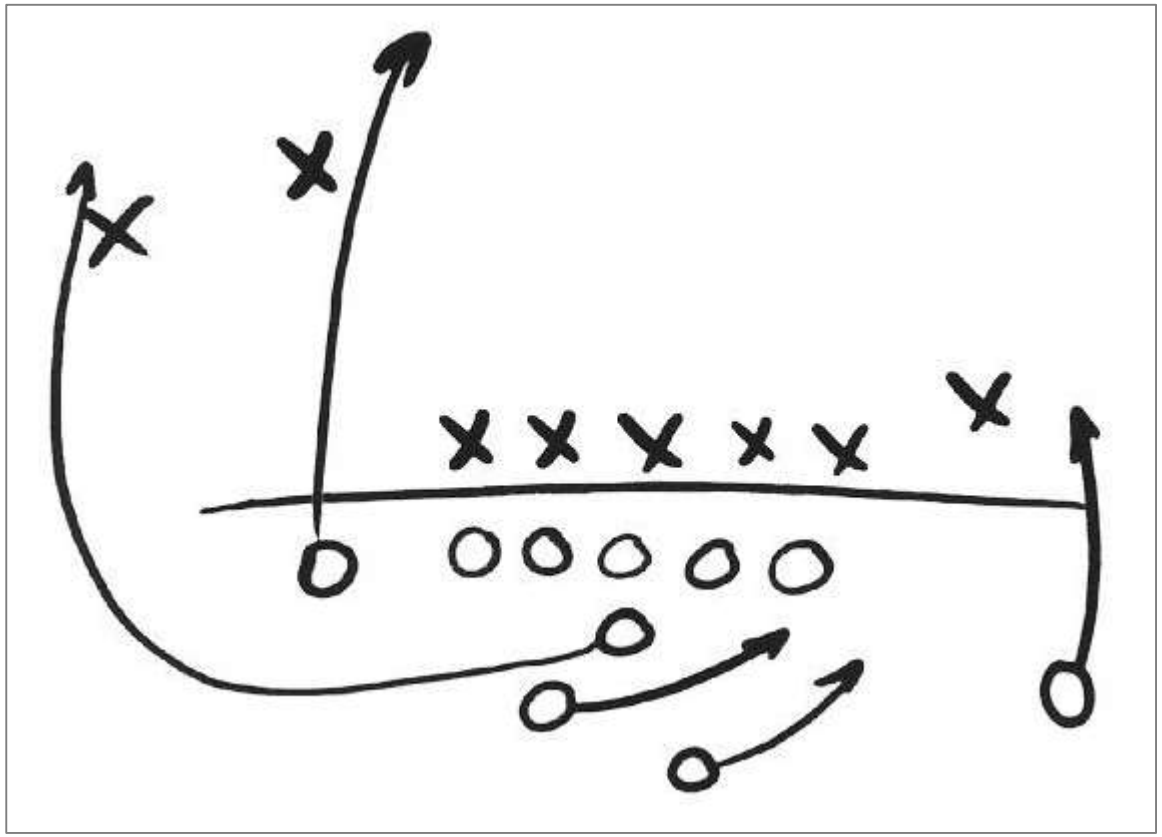
Problems with Admitting Attorney Admissions – Inhibits Plea Negotiations

> "A district court is entitled to consider whether trial use of informal attorney statements will ***lessen the prospects for plea negotiation*** or ***inhibit frank discussion*** between defense counsel and prosecutor ***on various topics that must be freely discussed*** in the interest of expediting trial preparation and the conduct of the trial."

U.S. v. Valencia, 826 F.2d 169, 173 (2nd Cir. 1987).

Same rationale would apply to discussions between counsel in a civil case

Strategies for Excluding Attorney Statements



Strategies for Excluding Attorney Statements – Courts must be careful

Point to courts' stated reluctance to admit.

- Courts should "exercise caution."
- Government "should only offer this sort of evidence in rare cases and when absolutely necessary . . . ."
- "[C]are must be exercised in the criminal context"
- "[C]ourts should be reluctant to consider attorneys' statements as party admissions . . ."

Strategies for Excluding Attorney Statements – Litigation Management

Argue statement fell outside attorney's authority as the client's litigator:

- Generally, trial lawyer's authority is limited to "litigation management"
- Retention for litigation only grants authority to make statements directly related to litigation management
- Statements not necessary for litigation management may exceed lawyer's scope of employment

Strategies for Excluding Attorney Statements – Litigation Management

Example:

- In a tax evasion suit, attorney made statements to IRS
- Statements deemed outside scope of litigation management
- But client signed a power of attorney authorizing lawyer to speak to IRS, so statements were admitted

If statement made outside litigation management, won't it almost always be true that the statement was authorized?

- Be prepared to answer: If outside assigned scope, why was the lawyer saying it?

Strategies for Excluding Attorney Statements – Opinion on the Ultimate Issue

The court should exclude:

- Opinions on the ultimate legal question (court's job)
- Opinions calculated to instruct the jury as to their verdict

Strategies for Excluding Attorney Statements – Take the Statement Literally

What did the lawyer actually say?

Example:

- Client accused of conspiracy
- Lawyer stated "substantial evidence exists" to support a conspiracy
- Not an admission that participation in the conspiracy actually occurred
- Excluded as irrelevant – did not tend to prove the existence of the conspiracy

Strategies for Excluding Attorney Statements – Take the Statement Literally

Did the lawyer actually say it?

Example:

- SEC memo summarizing statements of NASDAQ lawyers
- Memo did not contain quotes of attorney statements
- No testimony from the attorney's vouching for the accuracy of the memo
- Not admissible

Strategies for Excluding Attorney Statements – FRE 408

FRE 408: The following are not available to prove or disprove a claim, or impeach with a prior inconsistent statement:

- Offers or offers to accept a valuable consideration attempting to compromise a claim
- Conduct or statements made during compromise negotiations

Exceptions: Bias, negating contention of undue delay, proving an effort to obstruct a criminal investigation or prosecution

Strategies for Excluding Attorney Statements – FRE 410

FRE 410: In a civil or criminal case, the following is not admissible against the defendant who participated in plea discussions:

- Withdrawn guilty plea
- *Nolo contendere* plea
- Statement made during proceeding on those pleas
- Statement made during plea discussions if discussions did not result in guilty plea or they resulted in later-withdrawn guilty plea

Strategies for Admitting Attorney Statements – Not Offered for Truth of Matter Asserted

Rebuttal to arguments to exclude:

Example – Bribery Case

- "Div Mg Thought Payment Outside Usual Controls"
- Court asked to admit statement as
    - Admission of agent (801(d)(2)(D))
    - Not offered for truth of matter asserted (state of mind)
    - Statement of a co-conspirator (801(d)(2)(E))
    - Existing state of mind (803(3))

FRE 801(d)(2) in Criminal Cases

Some Potholes for the Criminal Defense Attorney to Avoid

Attorney Proffers

1. Establish innocence
2. Fish for information
3. State facts for possible plea: straight plea; non-prosecution agreement? Immunity? Cooperator?
4. Assume nothing is “off the record” unless specifically stated
5. Careful not to compromise client’s position if charged

United States v. Valencia
869 F.2d 169 (2d Cir. 1987)

- Informal bail discussions
- "Client innocent" – just met codefendant
- Oops – government learns otherwise
- District court – inadmissbile at trial
- Second Cir. affirmed – broader ruling – not just bail discussions
    1. Chilling plea discussions
    2. Informal statements subject to dispute
    3. Did not prove element of crime

United States v. Ahmed
2006 WL 3210037 (D. Mass. Aug. 3, 2006)
Unpublished Opinion

- Attorney presented innocence proffer – detailed chart
- Distinguished *Valencia* – informal v. formal presentation
- Statement stipulated – not subject to dispute
- Preliminary discussions not necessarily part of plea-bargaining process
- Innocence proffer not covered under Rule 410
- "The fact that a lawyer's unsuccessful maneuver might be used against the client will not unduly chill legitimate advocacy"

United States v. Ojala
544 F.2d 940 (8th Cir. 1976)

- Failure to file income tax returns timely
- Former attorney and Ojala meet with IRS –

  "failure to file was not political opposition to the war – client was simply neglectful."

- Court – admissible under 801
- Authorized; client (a lawyer) was present; did not object and set the record straight (even though lawyer told client not to talk at the meeting)

Protect Against Use of Proffer Statements

- Use of appropriate disclaimers
  - State expressly that facts are preliminary
  - Subject to change upon review of evidence
  - Use hypotheticals
  - Have prosecutor agree statements not attributable to client

Attorney Statements Made in Open Court Under 801

- Seminal case: *United States v. McKeon*, 738 F.2d 26 (2d Cir. 1984)
- Evidentiary use by government of criminal defendant's attorney's arguably inconsistent statement made during opening statement at earlier trial
- Proof that portions of defendant's present case fabricated

Five *McKeon* Criteria – Burden on Government by Preponderance

- Use of prior argument "consume[s] substantial time to pursue marginal matters"
- Must be excluded to avoid drawing unfair inferences, such as, government's obligation to prove all elements beyond reasonable doubt
- Deterring counsel from "vigorous and legitimate advocacy"
- Was there "innocent factual explanation of the inconsistency"
- Admission led to the "most serious consequence" of disqualifying defendant's choice of counsel

United States v. McKeon
738 F.2d 26 (2d Cir. 1984)

- Criminal case; conspiracy to export firearms
- Convicted after third trial
- Issue: Admissibility in 3rd trial of defense counsel's opening statements in 2nd trial
    - 2nd trial: Shipping documents not created by type of copy machine in bank where Ms. McKeon worked
    - 3rd trial: McKeon asked his wife to copy the documents as a favor to the actual shipper of the weapons

United States v. McKeon
738 F.2d 26 (2d Cir. 1984)

- Prosecution argued three grounds of admission:
  - Adopted by McKeon as his statement – 801(d)(2)(B)
  - Authorized by McKeon – 801(d)(2)(C)
  - Made by McKeon's agent, his counsel – 801(d)(2)(D)
- Trial judge admitted the statement
- He then disqualified McKeon's counsel
- McKeon proceeded *pro se*

United States v. McKeon
738 F.2d 26 (2d Cir. 1984)

Found:

- Prior jury argument not per se inadmissible because:
  - Would invite "abuse and sharp practice"
  - Would weaken confidence in justice system by denying the function of a trial as a truth-seeking proceeding
  - Cannot pursue truth if a party can make fundamental changes in his version of facts and conceal them from the trier of fact
- Admitted for the same reason superseded pleadings are admissible to show the party changed its story

United States v. McKeon
738 F.2d 26 (2d Cir. 1984)

But admitting prior jury argument must be limited to avoid "trenching upon other important policies"

- May "consume substantial time to pursue marginal matters"
- May lead to unfair inferences
- May deter counsel from vigorous and legitimate advocacy as he worries about previous statements

United States v. McKeon
738 F.2d 26 (2d Cir. 1984)

But admitting prior jury argument must be limited to avoid "trenching upon other important policies"

- May cause defendant to choose between explaining inconsistency or revealing:
    - Prior criminal record
    - Attorney-client communications
    - Work product
    - Trial tactics, legal theories
- May lead to disqualification of counsel
    - "a most serious consequence"

United States v. McKeon
738 F.2d 26 (2d Cir. 1984)

To admit prior jury argument, statement must:

- Involve assertion of an inconsistent fact
    - Not speculation, argument, advocacy, inferences
- Be clearly inconsistent
- Not require exploration of other facts at prior trial
- Equivalent to a testimonial statement from the defendant
    - Agency relationship with counsel not enough
    - Must have some participation by client

United States v. McKeon
738 F.2d 26 (2d Cir. 1984)

Court also dictated procedure to admit prior jury argument

- Hold hearing outside presence of jury
- Determine by preponderance of evidence that:
    - Inference to be drawn is fair
    - No innocent explanation for inconsistency
- Allow opportunity to present explanations *in camera*, outside presence of prosecution
    - To protect right against self-incrimination, attorney-client privilege etc.

United States v. McKeon
738 F.2d 26 (2d Cir. 1984)

Holding:

- Affirmed admission of prior argument
    - An adopted and authorized statement
- Also affirmed disqualification of counsel

McKeon appeared it might be the law for all attorney admissions

- Courts have since made it clear it applies to prior jury argument only
- May only apply in some courts to prior defense counsel argument

United States v. Salerno

937 F.2d 797 (2d Cir. 1991)

Good For The Goose – Good For The Defense

- Government's inconsistent positions in separate trials admissible. Quoting *McKeon:*

  "To hold otherwise would not only invite abuse and sharp practice but would also weaken confidence in the justice system itself by denying the function of trials as truth-seeking proceedings. That function cannot be affirmed if parties are free, wholly without explanation, to make fundamental changes in the version of facts within their personal knowledge between trials and to conceal these changes from the final trier of fact."

United States v. Amato
356 F.3d 216 (2d Cir. 2004)

- Bail revocation hearing
- Letter written by defense counsel inconsistent with later trial testimony
- Letter admitted under 801
- *McKeon* limited to jury arguments

United States v. Arrington
867 F.2d 122 (2d Cir. 1989)

- The government alleged that during their MCC meeting, Simels warned Harper that he should not testify against his "friends" from the "street while [his] family [was] out there"
- *McKeon* not applicable
- 801(d)(2) Analysis – Out of Court Statement

United States v. Doyle
2018 U.S. Dist. LEXIS 66980 (SDNY 4/19/18)

- Government sought to introduce defense counsel's allegedly false statements made during court hearing regarding document production
- Court – under 801 so long as other factors exist, no need for client to be present when attorney makes statements in issue
- Court excluded the statements under *McKeon* analysis
- *McKeon* not "strictly required" but its concerns "animate" discussions under 801 and 403

Brady Issues

- Attorney proffer statements likely subject to government disclosure if *Brady v. Maryland* applies
- Also *Jencks* material under 18 USC section 3500
- Admissibility under 801(d)(2) another issue

U.S. v. Triumph Capital Group
544 F.3d 149 (2d Cir. 2008)

- Notes taken by FBI agent during attorney proffer made by counsel for cooperator subject to disclosure
- Notes supported different version of facts at odds with government theory of the case
- Notes directly relevant to intent of defendant
- Government had no excuse

United States v. Nacchio
2006 WL 8439750 (D. Co. Aug. 28, 2006)

- Insider trading prosecution
- Attorney representations to prosecutors of client's proposed testimony discoverable
- Attorney proffer letters properly attributable to witness under 18 USC 3500

THANK YOU

Timothy S. Tomasik
tim@tkklaw.com
TKK
TOMASIK KOTIN KASSERMAN
TRIAL LAWYERS

Thad K. Jenks
thad.jenks@wtllaw.com
WEINSTEIN TIPPETTS & LITTLE LLP
NATIONAL TRIAL ATTORNEYS
BASED IN HOUSTON, TEXAS

Michael F. Bachner
mb@bhlawfirm.com
B&A
BACHNER & ASSOCIATES, P.C.
Attorneys At Law