EVIDENCE
(2014 FALL SEMESTER)

SYLLABUS

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This will tell you everything you need to know about the class and the dreaded exam. Despite that, some of you will ask me, repeatedly, questions which are answered here. Those of you who don’t ask will, nonetheless, be happy the others did. So, in a way, this is an experiment to see if, for the 25th consecutive year, I can write a syllabus to which no one pays any attention.

HOW WE’LL LEARN ABOUT EVIDENCE

The object of the course is to give you a working knowledge of the Federal Rules of Evidence and, where they differ, the Wisconsin Rules of Evidence. To have a working knowledge, though, one must understand the concerns and policies which prompted written rules.

We will spend some of our time in class developing some of our own rules of evidence. Once we’ve done that, we will compare our product with the Federal Rules and, where they differ, the Wisconsin Rules.

THE BOOK(S)

This is a large class and experience has taught me that different people learn in different ways. In the past, I have assigned text. This year I will not. Rather, I am recommending two texts and readings from one of them. If you wish to study from a text, choose the one that is most suited to your style of learning and your budget. You will find a study guide for those texts below.

If you choose to employ a text, I prefer that you not read the material on a topic until after we have discussed the topic in class.
You *will* need copies of the Federal Rules of Evidence and of the Wisconsin Rules of Evidence. These can be printed from the web.

The following are the suggested readings in Evidence. The suggested readings consist of those in (1) Lilly, Capra and Saltzburg, *Principles of Evidence* (6th Ed.) ("Lilly"); (2) Allen, Kuhns, Swift, Schwartz and Pardo, *Evidence* (5th Ed.) ("Allen"); and (3) duplicated materials including law review articles and selected cases, the citations for which are provided.

The Rule numbers listed are those of the Federal Rules of Evidence. These appear in the back of Lilly. In most instances, the Wisconsin counterpart can be determined by placing the numbers "90" in front of the Federal Rule. Rule 404 therefore is Wis. Stat. § 904.04. You are encouraged to read more of the text than has been suggested.

Every class takes on its own pace, so it's impossible to tell you in advance how many sessions we'll spend on each topic. We'll spend three weeks, more or less, on Relevance and a day or day and one half on Mechanics, for example. Pace your reading accordingly.

Those readings identified by citation or by a web address are your responsibility to look up.

I will point out where the Wisconsin Rules differ. *When I do that, it's usually wise to make notes.*

**RELEVANCE**

**RULES** 401-403, 412
Lilly, pp 32-67
Allen, pp. 122-169, 315-324

**RULES** 404-411
Lilly, pp. 67-112
Allen, pp. 244-305
Paul A. Ksciinski, *Uncharged Misconduct Evidence*, WISCONSIN DEFENDER, March/April 1996, see attachments

**RULES**, 608-609
Lilly, pp. 282-299
Allen, pp. 357-380
suggested additional reading:

*State v. Pullizano*, 155 Wis. 2d 633, 456 N.W.2d 325 (1990)
*Whitty v. State*, 34 Wis. 2d 278, 149 N.W.2d 557 (1967)
*State v. Sullivan*, 216 Wis. 2d 768, 576 N.W.2d 30 (1998)

re: RULES 403, 404, 607-609: Brief in opposition to the Government’s motion in
limine, *United States v. William R. Clemens, United States District Court for the District
of Colombia*, Case #1:10-cr-233 (RBW) Document #132-1, see attachments

**MECHANICS**

RULE 103
Lilly, pp. 5-31
Allen, pp. 79-121
*United States v. Mason*, 85 F.3d 471 (10th Cir. 1996)

**COMPETENCE AND DIRECT EXAMINATION**

RULES 601-603, 605, 606, 611, 612, 614, 615, 701, and 803 (5)
Lilly, pp. 11-23, 277-278
Allen, p. 175-181

suggested additional reading:


**IMPEACHMENT**

RULES 607-613
Lilly, pp. 278-312
Allen, pp. 351-404

**REHABILITATION**

RULE 801 (d) (1) (B)
Lilly, pp. 19-22

**EXPERT AND SCIENTIFIC TESTIMONY AND EVIDENCE**

RULES 701-705
Lilly, Chapter XI
Allen, pp. 633-715

Frye v. United States, 293 F. 1013 (C.A. D.C. 1923)
(see attachment)

DEMONSTRATIVE EVIDENCE AND AUTHENTICATION (REAL EVIDENCE)

RULES 901 and 902, 1001-1006
Lilly, Chapter XIII
Allen, Chapter Four

THE RULE AGAINST HEARSAY

RULE 801
Lilly, pp. 137-142
Allen, pp. 407-480
State v. Whitaker, 167 Wis. 2d 247, 481 N.W.2d 649 (Ct. App. 1992)

ADMISSIONS

RULE 801
Lilly, pp. 142-159

EXEMPTIONS

RULE 801(d)
Lilly, Chapter VII
Allen, pp. 448-480

EXCEPTIONS

RULES 803 and 804
Lilly, pp. 186-268
Allen, pp. 483-578

In General and Confrontation Clause
Lilly, Chapter VIII
Allen, pp. 579-624
Melendez-Diaz v. Massachusetts, 129 S.Ct. 2527 (2009)

JUDICIAL NOTICE AND 104

RULE 201
Lilly, pp. 27-31
Allen, pp. 773-791

PRIVILEGES

RULE 501
Lilly, pp. Chapter X
Allen, Chapter Twelve
Wis. Stat. § 905.01, et seq. [print out a copy for yourself for use during class]

SUGGESTED FILMS

Anatomy of a Murder
My Cousin Vinny


THE GRADE

There will be one examination, consisting of 150 true/false questions. The law school’s standard curve will be employed. Your grade for the course will be your grade on the examination. Class participation is a consideration to improve the grade when the examination score hovers at, for example, the cut-off between a B+ and an A. There are no past exams on file. Exams are graded using the method explained in the attachment, “A Guide to Grading Exams.”

I know that you will obsess, if not now then later, about a true/false exam. You ought not.

What you are about to learn is that the Rules of Evidence are not really rules. They are guidelines. Their employ will differ depending on the facts and legal issues presented in a given case, and on the judge’s exercise of discretion.

So, you ask, why would you give me give a true/false exam about something which sounds so nuanced, let alone make my entire grade dependent on it?
It could be that I’m a sadist.

But think about it. A true/false exam requires that the questions not be subject to differing interpretations. It means that I can only ask about the most basic principles. The exam is about the easy stuff.

You will have 4 hours to complete the exam. I promise that it’s ample time. What’s important is that you take the time to read each question carefully. The words and facts employed in each question are quite specific. It’s not to trick you but, rather, to prevent confusion about the question. In the past, those who’ve been disappointed in their grade on the exam completed it too quickly and didn’t use the time to read the questions with care.

To assist you in overcoming your angst, I will put on reserve two old copies of Broun and Blakey, Evidence (2d and 5th Ed.). In the back of each of these are true/false questions—and the answers. Many of the questions are remarkably similar in kind to those which I will ask on the exam.

If, despite what I’ve just explained, you remain over-anxious about a True/False exam, you will wonder whether this class may be taken Pass/Fail. The answer is yes.

**GOING TO COURT**

You are **required** to spend one day, or two half days, viewing a jury trial. This requirement is born of two concerns: first, that no law school student should ever graduate without having seen a jury trial; and, second, that some understanding of the rules of evidence will affect your perception of the process. Therefore, the fact that you have previously seen a jury trial will not excuse you from this requirement. You need only email me informing me of the date(s) on which you viewed a trial, in which court, who the presiding judge was, the name of the case; and whether you attended a full or half day. You need do no more than that; however, I have always been grateful for my students’ thoughts about the trial they observed, the quality of representation, or the value of the exercise.

Your viewing may be in any U.S. Court.

Juries in the Dane County Circuit Court and in the Federal Court for the Western District of Wisconsin are usually selected on Monday mornings; and the trials proceed thereafter (usually that afternoon). Thus, Tuesday is a particularly propitious day for effecting this assignment. Be warned, however, that there are weeks when neither of the two courts have any jury trials occurring. Therefore, putting this assignment off until the last minute can be disastrous. There are few trials occurring between Christmas and New Year. **Therefore, you must complete this assignment by the first class after Thanksgiving break.**
What usually happens is that most students put it off until the last minute, and then I am deluged with inquiries about whether the trial has to be a jury trial. It does. Small claims actions, divorce proceedings, foreclosures and other forms of bench trials do not count. Those who do not complete this assignment will receive points off their grade equivalent to half a grade (thus, a grade which equates to a B- would become a C+).

In the Federal Court, if a case is scheduled for trial on Monday, the Clerk of Court’s office will know, on the preceding Friday afternoon, whether it will truly proceed to trial. So, it is wise to call in advance. You can also check on PACER.

In Dane County Circuit Court many cases scheduled for trial on Monday will settle on that morning. There is an office of the Jury Clerk and, on Monday, she is incredibly busy. By mid-afternoon, though, much of the dust has settled and a call placed to her office may well reveal what cases will be in trial on Tuesday. Her office closes at 4:30 p.m. You may also access each of the Dane County Circuit Court Judges’ calendars by going to http://www.countyofdane.com/court/judge/.

Keep in mind that at both courthouses you will be searched; so its wise to double check your backpack beforehand, and remove the hash pipe and Walther PPK you forgot you’d left in it.

**THE BACK ROW**

Sitting in the back row is **NOT** permitted unless all other seats are taken.

**CRACKING JOKES**

I understand that class occurs between 5:40 and 7:40 p.m.; that most of you have not eaten dinner and that many of you are missing your favorite reality show. Good humor is appreciated and always appropriate.

**FAQ (INFREQUENTLY ASKED QUESTIONS)**

At the beginning of each class, and after each break, I will ask whether anyone has any questions. What usually occurs is that no one has any. Rather, when we take the ten minute break, people will line up in front of me to ask me the questions that they didn’t want to ask out loud for fear that their classmates will think them stupid; never really considering that the aged professor may need to use the john badly. Most of the time, more than half of the six people lined up to talk to me during the break will have the very same question; thereby necessitating my answering it three times rather than once for everyone.
You are about to become lawyers; and most of you (whether trial lawyers or not) will have to speak out loud in order to advocate for your client, maintain a business and communicate with others. Now is the time to start practicing.

ATTENDANCE

I do not take attendance. There are far better ways to spend one’s time. While I prefer you attend, you are all adults and you are paying for this. If you would rather be elsewhere, that is your decision. If that is your decision, please watch the video clip at: http://www.youtube.com/watch?v=qeSdC7lbA1A&feature=share

CLASS PARTICIPATION

Class participation might enhance your grade. It will enhance your learning. I do not employ the Socratic method. You will not be called upon to recite. Ever. I will ask your thoughts about things to which there is often no correct answer; and I will do so because I’m genuinely interested in your thoughts. If, when I do, you wish to take a moment to ponder your reply, please do so. The notion of a lawyer actually thinking before speaking is astounding.

FEEDING

Class occurs during the dinner hour. I’d rather your blood sugar was not depleted. Thus, I don’t mind if you eat during class as long as you chew with your mouth closed.

FEEDBACK

I really appreciate it; and preferably before you fill out the semester end review when it’s too late for me to change any bad habits which I may have developed. If I’m doing something wrong, let me know. If you wish for more examples, or more emphasis on certain areas, or repeating certain presentations, please request it.

MEETING WITH TEACH.

I work the night shift and, alas, am not afforded an office on site (let alone a lofty tower). If you’d like/need a one on one, call or e-mail my assistant, Maria Swenson (608-257-0945; mswenson@hbslawfirm.com), and she will get us set up pronto. You’ll like her better than me anyway.

E-MAILING ME

If you e-mail me, employ the subject line to tell me that the message is from a student (e.g.: “student question,” “student’s plaintive cry” or “student’s bitch”) so that I don’t spam it.
SPORTING EVENTS

Every year there are requests that I cancel class on a certain night, or nights, so that “everyone” can watch “the game.” (Curiously, it’s usually men who think “everyone” wants to see “the game.”) What a great idea! Perhaps this approach can be applied to my law practice, allowing me to ask the judge to call off my jury trial on Tuesday morning so that I can stay up late watching the game on Monday night. I’m sure it will enhance my standing with the court and with my client.

Or, perhaps, you should consider making friends with someone who owns a DVR.

ELECTRONIC RECORDING OF CLASS

Fine with me. If you are using a camera, please shoot from my left, which is my better side. You are not authorized, however, to disseminate it on YouTube, XTube, or anywhere else for that matter. You can use it, and you may show it to your classmates, to enhance your/their study.

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On Admissibility
Try to get business records introduced before trial

BY JAMES W. McELHANEY

"What a mess," said Mike Pirrelli, throwing his briefcase into the corner booth in the First Federal Soup and Sandwich Shop.

"What's wrong, Mike?" said Barbara Swanson. "You look like you're not entirely grunted."

"I'll say," said Mike. "I just spent the last hour and a half fighting over one stupid business record in Judge Feckler's court. How come my parents never warned me to stay away from dumb judges?"

"Pretty hard to do if you're going to practice law," said Dick Mudger.

"I don't like to run down members of our local bench," said Barbara Swanson, "but if my experience is any guide, the Hon. Anthony Lumbard Feckler does not understand any part of the hearsay rule—much less the business records exception."

That's when Angus looked up. "What happened, Mike?" he said.

"It's crazy," said Mike. "I'm representing Midwest Conveyor Belt in a fraud case they have against a janitorial service. Simple case. Anyway, I was trying to introduce a memo of a telephone conversation between our plant manager and the head of the janitorial service. Basic business record.

"So I put the chief of our records department on the stand and started laying the foundation, when Miles Bramble, who represents the janitorial service, asked to voir dire the witness. "Bramble starts out getting my witness to admit that he had no knowledge of what was in the memo, and whether it was true or not. So I'm sitting there, rolling my eyes and making faces, since it doesn't matter whether the witness knows anything about the contents of the record.

But then Bramble brings out that the witness has no knowledge whether the document was actually made at or near the time of the telephone conversation it described, and I start to worry. That's an essential part of my foundation.

"Then he develops that the witness didn't know whether or not the contents of the memo had anything to do with running a conveyor belt company. Or whether this record was routinely made in the ordinary course of our business.

Climbing Out of the Hole

"So then I try to rehabilitate my witness by asking about how records were kept two years ago, when the memo was written. And that's when I really get hammered. It turns out that he has only been with the company for six weeks. He keeps saying that he does not know what happened two years ago, and that his job is to keep track of records, not run the whole company.

"So Bramble says that my entire foundation violated Rule 602 of the Federal Rules of Evidence, and the witness doesn't have firsthand knowledge of anything he was testifying to. "Judge Feckler doesn't know what to do. He fusses and stews and we argue for another half hour, and he finally decides to sustain Bramble's objection. He makes a point of saying that he was not deciding that the record was inadmissible—only that I had failed to lay a proper foundation with this witness."

"You've got a real problem," said Angus.

"Tell me about it," said Mike. "What you need is a basic strategy for introducing business records so that lawyers like Bramble won't confuse judges like Feckler," said Angus.

I reached for my legal pad and started taking notes.

First you have to understand that the "custodian or other qualified witness" who is supposed to testify to the foundation of a business record under Rule 803(6) of the Federal Rules of Evidence will almost never have any more information than the witness Mike Pirrelli put on the stand.

Of course it doesn't matter that custodians don't know the contents of the records. If they did, you wouldn't need the records.

But what about the other points? Doesn't the document have to be made "at or near the time" of the events it records? Doesn't it have to be "kept in the course of a regularly conducted business activity"?

And doesn't it have to be the "regular practice of that business activity" to keep the record?

The answers are "yes."

But if the custodian can't give the right answers, how can you ever get a business record into evidence?

Usually the problem is ignored.
The questions are asked and the answers are given almost like a mystic incantation, and nobody minds that the custodian has no idea about the origins or circumstances of this particular piece of paper.

As long as the magic words are spoken, the record is admitted.

But when the point gets pushed, empty formalities are not enough. That’s when two rules come to the rescue.

First is Rule 104(a) of the Federal Rules of Evidence, which says that the judge is “not bound" by the rules of evidence (except those with respect to privileges) in determining whether a foundation has been established. In other words, evidence that would be inadmissible to prove one of the issues in a case might still be used to authenticate a document or establish the elements of an exception to the hearsay rule.

See what that does for Mike Pirelli. The witness doesn’t have to know whether the document was made or whether it has anything to do with the ordinary course of business. The judge can look at the date on the document to see when it was made, and study its contents to figure out whether it is relevant to business and was made at or near the events it records.

This doctrine can make up for a multitude of problems—if the judge is willing to apply it—because Rule 104 doesn’t say the judge must set aside the evidence rules when ruling on foundations. It just says the judge doesn’t have to follow them.

The second rule that helps make business records admissible is Rule 406 of the Federal Rules of Evidence:

“Evidence of the habit of a person or of the routine practice 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 practiced.”

So when the custodian of a document is unexpectedly literal and can’t tell you that a particular document was made at or near the event, don’t panic. Remember that Rules 104 and 406 are little, portable ladders you can use to get out of the hole you suddenly find yourself in.

All we really ask a custodian to do is authenticate the record—verify where it came from—and explain the company’s routines for document preparation and recordkeeping that meet the requirements of the business records rule. It’s even all right if this information is based on hearsay.

But there’s more to it than crawling out of a hole you fell into. Business records strategy starts with avoiding the hole in the first place.

Staying Out of the Hole

Make the admission of business records part of your discovery and trial preparation plan. One of the best ways to do this is with a request for admission under Rule 36 of the Federal Rules of Civil Procedure. Then the other side has 30 days to deny the request or it is taken as admitted.

Another approach is a motion in limine that asks for a pretrial ruling on the admissibility of evidence. A motion in limine is not just for keeping evidence out—it also applies to motions to let evidence in.

And even without a formal motion, the court can deal with premarking and preadmitting documents and other exhibits as part of a good pretrial conference.

But no matter how you do it, the point is to get your evidence admitted before trial—especially business records.

Why bother? Because the start of trial performs a Dr. Jekyll and Mr. Hyde transformation on the rules of evidence.

In the pretrial conference, the judge concentrates on sweeping aside minor quibbles and needless objections. If you have a business record that looks like it’s part of the case, the judge is going to admit it unless your opponent offers a good reason for keeping it out.

But once the trial starts, the game of technicalities begins. Then you will have to jump through every hoop, or your foundation will fail.

The worst part is when you offer the exhibit into evidence and your opponent says, “Objection, Your Honor. Foundation.”

And then the judge says, “Sustained.”

What happened? What did you leave out? You don’t have any idea. And your opponent’s objection—while technically sufficient—leaves you totally uninformed as to what you forgot.

You need a checklist that breaks down the business records statute into understandable elements. Here is the one Angus uses, based on the dense, 93-word sentence fragment in Rule 803(6) of the Federal Rules of Evidence:

* a record in any form of acts, events, conditions, opinions, or diagnoses;
* made at or near the time;
* by, or from information transmitted by, a person with knowledge;
* kept in the course of a regular business activity; and
* it is the regular practice of the business activity to make the record;
* is admissible unless the source of information or method or circumstances of preparation indicate a lack of trustworthiness; and
* the elements of the foundation can be shown by the custodian or other qualified witness. And, as Judge Peckler eventually found out, with a little help from Rules 104(a) and 406 of the Federal Rules of Evidence.
ATTORNEY-CLIENT PRIVILEGE UPDATE:
CURRENT AND RECURRING ISSUES

Approved by the Board of Regents
October 2012
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—Hon. Emil Gumpert, Chancellor-Founder, ACTL

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ATTORNEY-CLIENT PRIVILEGE UPDATE: CURRENT AND RECURRING ISSUES

This outline addresses a number of recent and recurring issues concerning the attorney-client privilege. It focuses primarily on the scope and reach of the privilege and the circumstances in which a waiver of the privilege may occur due to the involvement of, or disclosure to, certain categories of persons. The cases cited are intended to serve as illustrative examples of the relevant issues, and do not encompass or survey the law applicable to all jurisdictions.

1. Agents of the lawyer.

Employees working under the direct supervision and control of the attorney are included within the scope of the attorney-client privilege. This includes the attorney's paralegals, clerks, stenographers, summer associates, investigators, secretaries, and other attorneys. See, e.g., RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 70 cmt. g (2000). One court has suggested that the agency rule is limited to "ministerial agents of the attorney (such as clerks or stenographers) whose assistance is essential to the ordinary performance of legal services." F.T.C. v. TRW, Inc., 479 F. Supp. 160, 164 n.7 (D.D.C. 1979), aff'd 628 F.2d 207 (D.C. Cir. 1980) (emphasis added). Another court held that in order to be an agent of an attorney, the three fundamental requirements of an agency relationship must be satisfied: "First, an agent must have the power to affect the legal relations of the principal and others. Next, the agent is a fiduciary who works on behalf of the principal and primarily for his benefit. Last, the principal has the right to control the conduct of the agent." Henderson v. Nat'l R.R. Passenger Corp., 113 F.R.D. 502, 509 (N.D. Ill. 1986) (citations omitted).

In practice, however, the privilege has generally been extended beyond these narrow readings. The assistance need not be considered absolutely essential to the ordinary performance of legal services for the individual providing such assistance to fall within the scope of the privilege. See, e.g., United States v. Koerber, 2011 WL 2174355, at *9 (D. Utah June 2, 2011) ("At the time Mr. Koerber gave Ms. Taylor the letter, she was acting as his executive assistant. Mr. Koerber gave Ms. Taylor the letter for the purpose of proof reading it and returning it to him before he sent it to Mr. Moore for his legal review. Initially, federal courts have held [that] the passing [of] a communication to a secretary does not waive privilege."). Nor is a finding of legal agency typically required. The standard for determining who qualifies as an agent is amorphous, and different courts have used different words – ranging from "necessary," "needed," "indispensable," "required," and "highly useful" – in establishing a threshold for the level of assistance being sought by the attorney. See PAUL R. RICE, ATTORNEY-CLIENT PRIVILEGE IN THE UNITED STATES § 3:4 (database updated June 2012); California Evidence Code § 952 (no waiver where disclosed to those third persons who are present to further the interest of the client).

In recent years, the rise in corporate employment of paralegals in legal departments has forced courts to address how the privilege should extend to the work product of fairly autonomous paralegals. The critical question appears to be the level of supervision that attorneys exercise over

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1 This update was prepared by the Attorney-Client Relations Committee of the American College of Trial Lawyers. It is current as of October 2012.
the work of paralegals. See, e.g., Gucci Am., Inc. v. Guess?, Inc., 271 F.R.D. 58, 74 (S.D.N.Y. 2010) (finding paralegal’s opinions on potential trademark opinions not protected by attorney-client privilege because it was not established “that an attorney participated in the communications”; the fact that attorney was copied on emails was insufficient to support the extension of the privilege).

2. Communications with non-employee agents or functional equivalents of clients.

A line of cases has developed for the principle that the privilege will apply to communications made between the lawyer and a third party if the third party is necessary for the attorney to render legal advice to the client, because the third party is an agent or the functional equivalent of the client. See In re Bieter Co., 16 F.3d 929, 937 (8th Cir. 1994) ("[W]hen applying the attorney-client privilege to a corporation or partnership, it is inappropriate to distinguish between those on the client’s payroll and those who are instead . . . employed as independent contractors."). In In re Bieter, the leading case in this area, an independent contractor for the client who secured tenants for a real estate development, worked with architects, consultants, and counsel, and appeared before city council and planning commissions, was deemed to be a representative of the client for purposes of applying the attorney-client privilege. Id. In propounding this view, the Bieter court said that “too narrow a definition of ‘representative of the client’ will lead to attorneys not being able to confer confidentially with nonemployes who, due to their relationship to the client, possess the very sort of information that the privilege envisions flowing most freely.” Id. at 937-38.

Thus, courts have recognized that the privilege umbrella extends to protect communications of counsel with persons performing a variety of functions on behalf of clients, if such persons, although not employed by the client, are the “functional equivalent[s]” of the client. A court’s inquiry under the functional equivalence standard is very fact-specific. Compare Export-Import Bank v. Asia Pulp & Paper Co., 232 F.R.D. 103, 113 (S.D.N.Y. 2005) (concluding that communications with financial advisor were not protected under functional equivalence doctrine because no sufficient showing was made that consultant had primary responsibility for a key corporate job, had close and continuous relationship with company’s principals on matters critical to company’s litigation position, or likely possessed information possessed by no one else at the company), with In re Adelphia Commc’ns Corp., 2007 WL 601452 (Bankr. S.D.N.Y. Feb. 20, 2007) (holding that outside consultant was functional employee because the consultant had substantial responsibility for client relationship, was primary contact for this relationship, was authorized to speak on behalf of company, and interacted with company’s employees “just like any other employee”), and In re Bristol-Myers Squibb Sec. Litig., 2003 WL 25962198 (D.N.J. June 25, 2003) (setting forth a four-part test to evaluate whether a consultant is a “functional employee”). See also Neighborhood Dev. Collaborative v. Murphy, 233 F.R.D. 436, 439-40 (D. Md. 2005) (determining that financial consultant was functional equivalent of client in connection with communications to secure legal advice); In re Currency Conversion Fee Antitrust Litig., 2003 WL 22389169, at *1-3 (S.D.N.Y. Oct. 21, 2003) (holding that computer service company supporting credit card issuer did not meet “functional equivalence” test because it was simply a provider of “standard trade services”); Horton v. United States, 204 F.R.D. 670, 673 (D. Col. 2002) (concluding, in action concerning alleged release of contaminants on property, that a contract stating that third party was plaintiff’s agent for managing property and “self-serving” letter written from plaintiff to third party after litigation ensued did not establish that third party was functional equivalent of client for purpose of managing litigation); In re Copper Mkt. Antitrust Litig., 200 F.R.D. 213, 217-19 (S.D.N.Y. 2001) (finding communications by inside and outside counsel with public relations firm
privileged because public relations firm was functional equivalent of in-house public relations department, with authority to make decisions and statements, and to seek and receive legal advice concerning its duties); Energy Capital Corp. v. United States, 45 Fed. Cl. 481, 491-92 (Cl. Ct. 2000) (adopting rule recognized in Bieter, but declining to extend privilege to third-party consultants in absence of factual proof of agency for party claiming privilege).

Courts have also addressed situations in which the privilege has been seen as being improperly asserted by lawyers communicating in business capacities. For example, in Genentech, Inc. v. Trustees of University of Pennsylvania, 2011 WL 5079531 (N.D. Cal. Oct. 24, 2011), the CEO of a corporation, who was also a patent attorney, communicated with an outside consultant who could have been regarded as a “functional employee” of the company. However, the court found that the CEO’s communications were made for a business, rather than a legal, purpose. As such, these communications were not protected by the attorney-client privilege. This limitation has also been applied to perceived overreaching of inhouse counsel to prevent disclosure of what are essentially business, or nonlegal, communications. See, e.g., In re Rivastigmine Patent Litig., 237 F.R.D. 69, 80 (S.D.N.Y. 2006) (“[i]n analyzing communications created at the direction of in-house counsel, courts must be wary that the involvement of the attorney is not being used simply to shield corporate communications from disclosure.”) (citations omitted).

3. Third parties necessary to facilitate communication/advice.

The privilege has also been extended to protect communications involving, or shared with, a third party to the attorney-client relationship when the third party’s involvement was necessary to facilitate communication between the client and the attorney and the rendering of legal advice. This extension originally applied to third parties who were literally necessary to facilitate communication between the client and an attorney, such as an interpreter. E.g., Hawes v. State, 7 So. 302, 313 (Ala. 1889) (“A) n interpreter, intermediary, agent or clerk of an attorney, through whom communications between attorney and client are made, stands upon the same footing as his principal, and will not be allowed to divulge any fact coming to his knowledge as the conduit of information between them.”). The literal translation function remains part of the doctrine today. E.g., Farahmand v. Jamshidi, 2005 WL 331601, at *2-3 (D.D.C. Feb. 11, 2005) (holding that there was no waiver of privilege concerning client’s notes, originally in Farsi, prepared for conference with attorney, when relative attended conference in order to translate communications between lawyer and client); United States v. Salamanca, 244 F. Supp. 2d 1023, 1025 (D.S.D. 2003) (finding a translator to be the agent of an attorney because the translator “literally became the voice through which [the client] and his attorney could speak”).

The original rationale has now been extended to other, non-linguistic “translations” of information to assist communication or representation in a privileged environment. The leading case is United States v. Kovel, 296 F.2d 918 (2d Cir. 1961), in which the presence of an accountant during discussions between the attorney and the client did not waive the privilege because the accountant was necessary to help the attorney understand the client’s situation and render legal advice. The court explained:

Accounting concepts are a foreign language to some lawyers in almost all cases, and to almost all lawyers in some cases. Hence the presence of an accountant, whether hired by the lawyer or by the cli-
ent, while the client is relating a complicated tax story to the lawyer; ought not destroy the privilege . . . ; the presence of the accountant is necessary, or at least highly useful, for the effective consultation between the client and the lawyer which the privilege is designed to permit.

Id. at 922. The Kovel doctrine, also sometimes called the derivative attorney-client privilege, has been applied in many different contexts. Generally, two interpretive approaches have been applied to Kovel’s agency theory – the narrow approach and the broad approach. See Michele DeStefano Beardslee, The Corporate Attorney-Client Privilege: Third-Party Doctrine for Third-Party Consultants, 62 SMU L. REV. 727, 746-47 (2009) (remarking that “the common thread for applying a narrow interpretation of Kovel is the ability to analogize the third-party consultant’s role to that of a translator” while the broad interpretation is premised on third parties “who provide services that merely facilitate the attorney’s ability to render legal advice”) (emphasis added). Presented below is an overview of the application of Kovel in several different contexts:

A. Appraisers.

An appraiser who worked closely with a bank regarding the plaintiff’s collateral and provided information important to the bank’s strategy in dealing with the plaintiff was properly included in the scope of the attorney-client privilege with regard to discussions at a meeting with the bank and the bank’s attorney. Steele v. First Nat’l Bank, 1992 WL 123818 at *2 (D. Kan. May 26, 1992). See also Bernardo v. C.I.R., 104 T.C. 677, 685-86 (1995) (finding the work of an appraiser to be protected by attorney-client privilege when the appraiser provided estimates and a draft appraisal, at the attorney’s direction, concerning a potential charitable donation to be made by the attorney’s client).

Recently, the U.S. Court of Appeals for the Ninth Circuit held that an appraiser’s report was not protected by the attorney-client privilege. United States v. Richey, 632 F.3d 559 (9th Cir. 2011). In United States v. Richey, an appraiser prepared an appraisal report that was to be filed with the taxpayer’s tax return, as required by IRS regulations. Id. at 562. The report said that “this report may not include full discussion of the data, reasoning, and analyses that were used in the appraisal process to develop the appraiser’s opinion of value. Supporting documentation concerning the data, reasoning, and analyses is retained in the appraiser’s file.” Id. at 563. In reversing the district court’s holding that this additional data was protected by the attorney-client privilege, the Ninth Circuit noted that “any communication related to the preparation and drafting of the appraisal for submission to the IRS was not made for the purpose of providing legal advice, but, instead, for the purpose of determining the value of the Easement.” Id. at 567.

B. Accountants.

A number of cases have held that the participation of accountants in attorney-client communications does not waive privilege. Kovel, discussed above, is undoubtedly the seminal case concerning the role of accountants. See also Grand Jury Proceedings Under Seal v. United States, 947 F.2d 1188, 1190-91 (4th Cir. 1991) (holding that communications involving accountant were protected); United States v. Hudson, 322 F.2d 460, 462-63 (9th Cir. 1963) (determining that attorney-client privilege protected document prepared by accountant and communicated to attorney when
accountant’s role was to “facilitate an accurate and complete consultation between the client and the attorney about the former’s financial picture”; In re U.S. Healthcare, Inc. See: Litig., 1989 WL 11068, at *2-3 (E.D. Pa. Feb. 8, 1989) (concluding that accountant’s presence at meeting with attorney and his client did not result in waiver of the attorney-client privilege when the accountant’s expertise was necessary to render legal advice).

But when the accountant’s participation is not for the purpose of facilitating legal advice, the communication is not protected. See, e.g., Cavallaro v. United States, 284 F.3d 236, 240, 249 (1st Cir. 2002) (finding that the Kovel doctrine requires that an accountant’s involvement be at least “highly useful” and more than just “useful and convenient”; thus, documents in accounting firm’s possession arising out of attorney-client meetings or other communications were not privileged); Summit Ltd. v. Levy, 111 F.R.D. 40, 41-42 (S.D.N.Y. 1986) (holding that document constituting communication with lawyer that was shared with accountant in connection with regular financial counseling, rather than the seeking of legal advice, was not privileged). In Commissioner of Revenue v. Comcast Corp., 901 N.E.2d 1185, 1197-98 (Mass. 2009), the Massachusetts Supreme Judicial Court subscribed to a narrow interpretation of Kovel (favorably citing Cavallaro v. United States), finding that “[the attorney’s] affidavit and the [Arthur] Andersen memoranda demonstrate that [the attorney’s] purpose in consulting Andersen was to obtain advice about Massachusetts tax law, not to assist [him] with comprehending his client’s information.” See also Callaway Golf Co. v. Screen Actors Guild, 2009 WL 81387, at *2 (S.D. Cal. Jan. 12, 2009) (audit firm hired to examine contracts not protected by attorney-client privilege); Schlicksup v. Caterpillar, Inc., 2011 WL 4007670, at *4 (C.D. Ill. Sept. 9, 2011) (“[E]ven if these communications were made by a lawyer, many of them would still not be protected by the attorney-client privilege. Proposals on tax-saving strategies and the creation, analysis and implementation of business ideas to bolster the bottom line are not confidential communications of legal advice.”).

C. Investment bankers/financial consultants.

In Calvin Klein Trademark Trust v. Wachner, 124 F. Supp. 2d 207, 209 (S.D.N.Y. 2000), the court followed Kovel to hold that communications in connection with the preparation of offering memoranda and other disclosure documents concerning a possible sale, involving company representatives, counsel and an investment banking firm, were privileged. Upon in camera review of the documents and a privilege log, the court found:

[The documents . . . involve, in one way or another, joint discussions among CKI [the company], Lazard [investment banking firm], and Wachtell [counsel], as to what CKI was legally required to disclose to prospective purchasers at various stages of negotiations. While Warnaco argues that Lazard’s inclusion in the discussions waived the attorney-client privilege that would otherwise apply to the documents that reflect those discussions, it is clear to the Court that Lazard’s roles in participating in those discussions and helping draft these documents, to the extent such roles were more than ministerial, involved rendering expert advice as to what
a reasonable business person would consider "material" in this context. "Materiality" in this regard is a mixed question of fact and law, which a responsible law firm in Wachtell's place would not be able to adequately resolve without the benefit of an investment banker's expert assessment of which facts were "material" from a business person's perspective. Lazard was therefore serving, so far as these documents are concerned, an interpretive function . . . akin to the accountant in . . . [Kovel].

Id. at 209. Thus, inclusion of the investment banking firm in the privileged conversation to the extent necessary to supply investment banking expertise to assist the lawyer in advising the client (on legal, not business issues) did not destroy privilege. Id. See also Urban Box Office Network, Inc. v. Interfase Managers, L.P., 2006 WL 1004472, at *3-4, *6-7, *9 (S.D.N.Y. Apr.17, 2006) (those communications involving or shared with financial advisor in the role of assisting counsel are within attorney-client privilege; others constituting business communications are not). Recently, in In re Refco Sec. Litig. v. Sugrue, 2011 LEXIS 113619, at *43-44 (S.D.N.Y. Sept. 30, 2011), the court was unconvincing that a third-party consultant with over 40 years of experience in the industry was necessary to the lawyer's ability to understand a client's materials. As such, the privilege did not extend to these materials. Id.

D. Public relations consultants.

Numerous cases have addressed the application of the privilege to communications including public relations consultants, and have come to different conclusions depending on the degree to which the proponent could show the importance of the advice to the legal advice to the client. F.T.C. v. GlaxoSmithKline, 294 F.3d 141, 148 (D.C. Cir. 2002) (attorney-client privilege extends to communications with public relations and governmental affairs consultants to deal with issues intertwined with legal issues); Am. Legacy Found. v. Lorillard Tobacco Co., 2004 WL 2521289, at *4-5 (Del. Ch. Nov. 3, 2004) (confidential communications with public relations firm may be protected by attorney-client privilege in certain circumstances; proponent of privilege failed to establish factual predicate); In re Grand Jury Subpoenas, 265 F. Supp. 2d 321, 332 (S.D.N.Y. 2003) (confidential communications between lawyers and public relations consultants for purpose of giving or receiving advice directed to handling client's legal problems are protected by attorney-client privilege); Haugh v. Schroder Inv. Mgmt. N. Am. Inc., 2003 WL 21998674, at *3 (S.D.N.Y. Aug. 25, 2003) (proponent of privilege failed to establish that purpose of communications with public relations advisor was to facilitate legal advice or to further a role materially different than that of an ordinary public relations advisor).

E. Other.

In United States v. Mejia, 655 F.3d 126, 133 (2d Cir. 2011), the court held that a prisoner's use of his sister to relay a communication to his lawyer was neither necessary nor likely useful to the prisoner's representation because he could have directly contacted his lawyer. Accordingly, a prison recording of the conversation between the prisoner and his sister was admissible. See also MLC Automotive, LLC v. Town of Southern Pines, 2007 WL 128945, at *3-4 (M.D.N.C. Jan. 11, 2007) (communications with engineer to assist counsel in providing legal advice are within attorney-client privilege).
F. Limitations/qualifications.

There are additional limitations on the application of the privilege in the context of communications involving a third party. For example, communications directly between a client and the client’s consultant or expert outside the context of attorney-client communications are not protected. See, e.g., Grand Jury Proceedings, 947 F.2d at 1191 (communications between client and accountant prior to consultation with attorney were not privileged). Similarly, communications between an attorney and a third-party consultant (at least when that consultant is not the “functional equivalent” of the client) outside the context of assisting in communications between the lawyer and client may not be protected by the attorney-client privilege. See, e.g., Sokol v. Wyeth, Inc., 2008 WL 3166662 (S.D.N.Y. Aug. 4, 2008) (finding that consultant retained prior to attorney being retained could not offer legal advice because “[l]egal advice cannot be given by one who is not an attorney and no attorney-client privilege is afforded to any advice purporting to be legal from one who is not an attorney”).

In United States v. Ackert, which is generally regarded as the basis for a narrow interpretation of Kovel, the attorney-client privilege did not apply when an attorney communicated directly with an investment banker to gather information necessary to give legal advice to his client. United States v. Ackert, 169 F.3d 136, 139-40 (2d Cir. 1999) (communication between attorney and investment banker not shielded by the attorney-client privilege solely because communication was important to the attorney’s ability to represent the client, if the investment banker was not translating information or facilitating communication); see also Banco do Brasil, S.A. v. 275 Washington St. Corp., 2012 WL 1247756 (D. Mass. Apr. 12, 2012) (“In the instant case, Ms. Ou was not hired to assist counsel in rendering legal advice—she was hired to rent the Premises. In addition, while Attorney Hammer asserts that Ms. Ou provided him with information which he used in providing legal advice to the Trust, communications from a third-party ‘that constitute independent information and expertise for the attorney to use in representing his or her client are not protected by the attorney-client privilege.’”) (quoting Comcast Corp., 901 N.E.2d at 1198).

In addition, even if the presence of the third party does not waive the privilege, there is still the general privilege requirement that the communication be sufficiently connected to the rendering of legal advice. "That clients were at a meeting with counsel in which legal advice was being requested and/or received does not mean that everything said at the meeting is privileged." Lewis v. UNUM Corp. Severance Plan, 203 F.R.D. 615, 619 (D. Kan. 2001) (privilege does not protect discussions at committee meeting attended by counsel unless communication was between committee and counsel for the purpose of obtaining legal advice) (citation omitted). When the ultimate goal of the client is a business goal, it is not obvious that all communications on this subject to which the attorneys were privy was made for the purpose of generating legal advice. If there is a meeting between an attorney, a client, and a third party such as an investment banker, only the communications concerning legal advice are protected. Id. at 619; see also Kovel, 296 F.2d at 922 (“What is vital to the privilege is that the communication be made in confidence for the purpose of obtaining legal advice from the lawyer. If what is sought is not legal advice but only accounting service . . . , or if the advice sought is the accountant’s rather than the lawyer’s, no privilege exists.”) (emphasis added) (internal citations omitted).
4. **Intra-organizational communications not involving lawyer.**

The conveyance of otherwise privileged communications by non-lawyers to others within the client organization who have a need for the communications does not waive the privilege. In *F.T.C. v. GlaxoSmithKline*, 294 F.3d at 147-48, the court held that privileged documents that were subject to limited intra-corporate distribution retained the privilege despite the absence of a showing by the corporation that each employee or contractor who received the documents had a specific "need to know" the information, if the documents "related generally to the employees' corporate duties." "The company's burden is to show that it limited its dissemination of the documents in keeping with their asserted confidentiality, not to justify each determination that a particular employee should have access to the information therein." *Id.* at 147. See *also Apsley v. Boeing Co.*, 2008 U.S. Dist. Lexis 99515, at *9 (D. Kan. Dec. 9, 2008) (attorney-client privilege is not lost merely because employee conveys the legal communication to another employee); *Baptiste v. Cushman & Wakefield, Inc.*, 2004 U.S. Dist. Lexis 2579, at *5-8 (S.D.N.Y. Feb. 20, 2004) (email by non-lawyer corporate employee disseminating information and advice given by lawyer to other non-lawyer employees with responsibility for the subject matter did not lose privileged status); *Nat'l Educ. Training Grp. v. Skillsoft Corp.*, 1999 U.S. Dist. Lexis 8680, at *10 (S.D.N.Y. June 9, 1999) (noting cases that hold that intra-corporate distribution of legal advice received from counsel does not necessarily vitiate privilege, even if relayed indirectly through other corporate personnel, but holding that notes of third-party recipient who did not meet client-agency test were not privileged).

Other courts have imposed on the company a requirement to prove that the recipients had a "need to know" in addition to a responsibility for the subject matter. However, even in these cases, the courts' focus usually remains on whether the information was restricted to a proper circle of confidentiality. See, e.g., *Wellinx Life Sciences, Inc. v. Iovate Health Sciences Research, Inc.*, 2007 U.S. Dist Lexis 39290, at *11-12 (S.D.N.Y. May 22, 2007) (evidentiary hearing required to determine whether document had been treated with sufficient intent to retain confidentiality). For example, in *Clarke v. J.P. Morgan Chase & Co.*, 2009 U.S. Dist. Lexis 30719, at *5-7 (S.D.N.Y. Apr. 10, 2009), the court held that when a communication circulated to employees did not indicate that it was to be maintained in confidence, and its confidential nature or status as confidential legal advice was not apparent from its face, there was no reasonable expectation of confidentiality on the part of the client.

The privilege has been extended to information exchanged between corporate actors in the absence of lawyers before a communication to counsel, when the purpose is to seek legal advice or assist counsel. *Carl Zeiss Vision Int'l GMBH v. Signet Armorlite, Inc.*, 2009 U.S. Dist. Lexis 111877, at *17-21 (S.D. Cal. Dec. 1, 2009) (memoranda of non-legal patent review committee protected as privileged because purpose was to obtain legal advice from counsel); *Williams v. Sprint/United Mgmt. Co.*, 238 F.R.D. 633, 638 (D. Kan. 2006) (privilege preserved on documents exchanged among human resources personnel where such documents were made to gather information to aid counsel or to secure advice; cases surveyed). The "legal advice" element has also been at issue when documents asserted as privileged have been simultaneously circulated to legal and non-legal personnel within an organization. See *Buspirone Antitrust Litig.*, 211 F.R.D. 249, 252-55 (S.D.N.Y. 2002) (simultaneous circulation of information to lawyers and key business personnel did not vitiate privilege when circulation to business personnel was not for separate business purpose; simultaneous circulation cases reviewed).
5. Disclosures among separate entities in corporate family.

“There is overwhelming case law supporting the proposition that the existence of communications of privileged information between a parent and its subsidiary does not constitute a waiver of an applicable privilege.” *In re 15375 Mem'l Corp.*, 2007 Bankr. Lexis 610, at *6-7* (Bankr. Del. Mar. 1, 2007) (communications regarding bankruptcy shared with affiliates remained privileged). Some courts have reached this result in a summary fashion based upon the existence of a close relationship between the entities, *e.g.*, *Brigham Young Univ. v. Pfizer, Inc.*, 2011 U.S. Dist. Lexis 76317, at *17-18* (D. Utah July 12, 2011) (although separate corporate entities, relationship between LDS Church and BYU was different than a third-party relationship in which privilege would be lost); *JA Apparel Corp. v. Abboud*, 2008 U.S. Dist. Lexis 1825, at *5-6* (S.D.N.Y. Jan. 10, 2008) (presence of employee of corporate owner of 98% of subsidiary did not, by itself, vitiate privilege), while others have relied upon the corporate affiliate’s “legal interest” in the communication at issue. *E.g.*, *Cary Oil Co., Inc. v. MG Refining & Mktg., Inc.*, 2000 WL 1800750, at *6* (S.D.N.Y. Dec. 7, 2000) (subsidiary does not waive privilege by making disclosures to corporate parent with legal interest in communication). Still other courts have examined the question using the language of “common interest” analysis. *E.g.*, *Mitsui Sumitomo Ins. Co. v. Sony Corp. of Am.*, 2011 U.S. Dist. Lexis 74148, at *13-15* (S.D. Fla. July 11, 2011) (privilege preserved where various corporate entities shared common legal interests with their parent companies); *Gulf Islands Leasing, Inc. v. Bombardier Capital, Inc.*, 215 F.R.D. 466, 473-74 (S.D.N.Y. 2003) (status of two companies as subsidiaries of common corporate parent not dispositive as to whether privilege preserved on inter-corporate communications where there was no representation by common counsel or proof of common legal interest). *See also Caremark, Inc. v. Affiliated Computer Servs., Inc.*, 192 F.R.D. 263, 269 (N.D. Ill. 2000) (consultant and representative of corporate parent and subsidiary were part of “control group” for purposes of privileged communications).

6. Responses to auditors’ requests/communications with auditors.

Generally, the attorney-client privilege is waived as to information provided to auditors, who are neither serving as the “functional equivalent[s]” of the client in handling the litigation, nor interpreting information to facilitate communications between the lawyer and client (see exceptions to waiver discussed in topics 2 and 3 above). *See e.g.*, *United States v. El Paso Co.*, 682 F.2d. 530, 540 (5th Cir. 1982); *In re Honeywell Int’l, Inc. Sec. Litig.*, 230 F.R.D. 293, 298 (S.D.N.Y. 2003); *First Fed. Sav. Bank of Hegewisch v. United States*, 55 Fed. Cl. 263, 268 (Cl. Ct. 2003); *Ferko v. Nat’l Ass’n for Stock Car Auto Racing, Inc.*, 218 F.R.D. 125, 134 (E.D. Tex. 2003).

However, a majority of cases have held that disclosure of privileged information to auditors does not waive work product protection. *See e.g.*, *Lawrence Jaffe Pension Plan v. Household Int’l, Inc.*, 237 F.R.D. 176, 179-83 (N.D. Ill. 2006). In *Lawrence Jaffe*, the court held it sufficient for work product protection that audit letters were prepared “because of” litigation, and that it was not necessary that the materials be prepared to assist with litigation. *Id.* at 179-81. The court also held that disclosure of information to the auditor as a third party did not waive work product protection; although the auditor served in a public watchdog role with certain independence, disclosure of litigation reports to the auditor did not substantially increase the opportunity for potential adversaries to obtain the information. *Id.* at 183. *See also In re JDS Uniphase Corp. Sec. Litig.*, 2006 WL 2850049, at *1-2* (N.D. Cal. Oct. 5, 2006) (disclosure of document to corporate auditor did not constitute a waiver of work product protection); *Merrill Lynch & Co., Inc. v. Allegheny Energy, Inc.*, 229 F.R.D.
7. **Disclosures concerning litigation to potential purchaser of client.**

There is a split in the relatively undeveloped case law concerning whether disclosure of privileged information from and about the seller to the purchaser as part of pre-transaction due diligence waives privilege protection for the material disclosed. The majority of cases appear to reject the notion that such disclosure constitutes waiver, at least where the disclosure has been made under agreements that limit dissemination. See, e.g., *Tenneco Packaging Specialty and Consumer Prods., Inc. v. S.C. Johnson & Son, Inc.*, 1999 WL 754748, at *2 (N.D. Ill. Sept. 14, 1999) (disclosure of patent opinion in connection with due diligence for asset purchase agreement encompassing the patent did not waive privilege, because of common legal interest of buyer and seller, and steps taken to insure confidentiality and limited dissemination); *Rayman v. Am. Charter Fed. Sav. & Loan Ass’n*, 148 F.R.D. 647, 651-55 (D. Neb. 1993) (litigation reports shared during merger negotiations retained privileged status because of common legal interest); *Hewlett-Packard Co. v. Bausch & Lomb Inc.*, 115 F.R.D. 308, 309-12 (N.D. Cal. 1987) (disclosure of patent opinion letter to prospective purchaser of business division did not waive attorney-client privilege because of common legal interest and steps taken to preserve confidentiality). But see *SCM Corp. v. Xerox Corp.*, 70 F.R.D. 508, 512-13 (D. Conn. 1976) (privilege waived as to information of one party to joint venture shared with other joint venturer in negotiations concerning acquisition of interest: parties negotiating arms’ length business transaction were adverse, and therefore did not have sufficiently common legal interest in subject matter of antitrust risk).

8. **Communications with former employees of client.**

“The vast majority of federal cases hold that communications between company counsel and former company employees are protected by the attorney-client privilege if they are focused on exploring what the former employee knows as a result of his prior employment about the circumstances giving rise to the lawsuit.” *Surles v. Air France*, 2001 WL 815522, at *6 (S.D.N.Y. July 19, 2001) (collecting cases). But see *Infosystems, Inc. v. Ceridian Corp.*, 197 F.R.D. 303, 306 (E.D. Mich. 2000) (counsel’s communication with former employee of client corporation generally should be treated no differently than communications with any other third-party fact witness; court declines to follow reasoning that communications concerning witness conduct and knowledge during period of employment should be privileged).

9. **Disclosures to refresh witness recollections.**

Federal Rule of Evidence 612 provides that an adverse party is entitled to production of a document used by a witness to refresh recollection before or while testifying, if the court in its discretion determines that the interests of justice require disclosure. A balancing test based upon this rule has also been applied in connection with privileged documents reviewed by witnesses in preparation for a deposition. *Medtronic Xomed, Inc. v. Gyrus ENT LLC*, 2006 WL 786425, at *4 (M.D. Fla. Mar. 2006).
27, 2006) (party seeking production of work product reviewed by deponent failed to prove that witness’s recollection had been refreshed, or that witness relied on the document in testifying). Several courts have noted a tension between Rule 612 and the work product doctrine, holding that the Rule does not obviate the need for a party seeking to override the work product doctrine to prove “substantial need” or “undue hardship.” Id. at *5-6. See also In re Managed Care Litig., 415 F. Supp. 2d 1378, 1380-81 (S.D. Fla. 2006) (explaining that courts have used different approaches to resolve tension between the need for information to ensure opportunity for effective cross-examination under Rule 612 and assertions of privilege; rejecting rule of older cases imposing automatic waiver of attorney-client privilege and holding deposition testimony at issue did not result in waiver); Woodward v. Avondale Indus., Inc., 2000 WL 385513, at *2-3 (E.D. La. Apr. 14, 2000) (balancing test favored production of work product document when witness relied heavily on it in deposition testimony, it primarily included facts and did not contain opinion work product, and it had been relied upon by witness to prepare affidavit already disclosed).

10. Disclosures to testifying experts.

A major change in the treatment of information and materials provided to testifying experts occurred on December 1, 2010, when new amendments to Federal Rule of Civil Procedure 26 took effect. The overhaul of Rule 26 significantly expanded protection from discovery for communications between attorneys and their testifying experts in an effort to increase candor between counsel and experts, and to rein in the practice of hiring dual experts, which had developed in response to the expansive disclosure requirements under the previous version of Rule 26. See generally Arthur J. Clarke, An Update on the New Federal Expert Discovery Rule: The Expert’s Perspective, 23 ENVTTL. CLAIMS J. 214 (2011); Damon W.D. Wright, Expert Discovery Returns to the Past, THE FED. LAW., Jan. 2011, at 32. For example, Rule 26 now generally protects from discovery “drafts of any report or disclosure required under Rule 26(a)(2), regardless of the form in which the draft is recorded.” Fed. R. Civ. P. 26(b)(4)(B).

Furthermore, the 2010 amendments effected significant changes in the disclosure requirements applicable to reporting testifying experts—experts who must submit a report of their opinions and conclusions under Rule 26(a)(2)(B). All communications between a reporting testifying expert and the attorney of the party retaining the expert are now protected from disclosure

“regardless of the form of the communications, except to the extent that the communications (i) relate to compensation for the expert’s study or testimony; (ii) identify facts or data that the party’s attorney provided and that the expert considered in forming the opinions to be expressed; or (iii) identify assumptions that the party’s attorney provided and that the expert relied on in forming the opinions to be expressed.” Fed. R. Civ. P. 26(b)(4)(C) (emphasis added).

Therefore, the rationale for broad disclosure, which courts relied upon under the previous version of Rule 26—that “because any disclosure to a testifying expert in connection with his testimony assumes that privileged or protected material will be made public, there is a waiver [of attorney-client privilege and work product protection] to the same extent as with any other disclosure,” In re Pioneer Hi-Bred International, Inc., 238 F.3d 1370, 1375-76 (Fed. Cir. 2001) (stating majority opinion
among courts under 1993 amendments to Rule 26)—should no longer be persuasive. Instead, otherwise privileged (through the attorney-client privilege) or protected (under the work product doctrine) communications will not have to be disclosed until the other side can meet more stringent criteria for demonstrating need for the material. See, e.g., Sara Lee Corp. v. Kraft Foods, Inc., 273 F.R.D. 416 (N.D. Ill. 2011). In Sara Lee, the court found that even assuming a marketing expert was in the reporting-testifying category, communications between that expert and defense counsel, which “arguably may have been discoverable under the pre-amendment Rule 26” no longer had to be disclosed because they did not identify facts, data, or assumptions for purposes of Rule 26(b)(4)(C), and thus received the work-product protection of Rule 26(b)(3). Id. at 420-21. Thus, under the new amendments, the communications were only discoverable if the requesting party could show that it “ha[d] substantial need for the materials to prepare its case and [could not], without undue hardship, obtain their substantial equivalent by other means.” Id. at 421 (citing Fed. R. Civ. P. 26(b)(3)(A)(ii)).

This expanded protection, however, generally does not apply to communications with testifying experts who do not have to provide a report under Rule 26(a)(2)(B) because they are either fact witnesses or so-called “treat Expert witnesses” who provide factual information intermixed with expert opinions. See United States v. Sierra Pac. Indus., 2011 WL 2119078, at *3-6 (E.D. Cal. May 26, 2011) (carefully reviewing minutes of Civil Rules Advisory Committee meeting on 2010 amendments and concluding that “[t]he minutes...show that the committee did not intend that communications between a party’s counsel and non-reporting experts generally be protected”). Therefore, the law prior to the date of the [2010] amendment determines whether a party has waived applicable protections” of communications with testifying, non-reporting experts. Id. at 7-10 (canvassing Ninth Circuit law on waiver of privileges and work product protection, finding that waiver was generally found when materials were disclosed to non-reporting testifying experts, and rejecting New Jersey authority to the contrary in Graco v. PMC Global, 2011 WL 666056, at *13-15 (D.N.J. Feb. 14, 2011), because it did not provide “persuasive reason for rejecting” Ninth Circuit decisions). The Sierra Pacific court left open the possibility that certain kinds of non-reporting testifying witnesses could be entitled to more protection than others, id. at 10, but resolution of this issue will have to await further case law. But see Graco, 2011 WL 666056, at *13-15 (generally applying same protections to both reporting and non-reporting testifying witnesses).

11. Communications by employees with counsel using employer’s email system.

Especially in employment and non-compete cases, questions have arisen about whether and to what extent email communications by an individual to her counsel using her employer’s email system, or computer files concerning attorney-client communications maintained on the employer’s system, retain privileged status.

In federal court, unless state law provides the rule of decision with respect to an element of a claim or defense, pursuant to Federal Rule of Evidence 501, federal common law on privileges controls. See, e.g., In re Royce Homes, 449 B.R. 709, 721-22 (Bankr. S.D. Tex. 2011) (relying on Rule 501, as interpreted by the U.S. Court of Appeals for the Fifth Circuit, to determine that because Bankruptcy Rule 2004 examinations are governed by federal bankruptcy law, not state law, federal common law governed privilege claims in that case). Under federal common law, waiver of the attorney-client privilege can be effected by “disclosure [of communications] inconsistent with an intent that communications remain confidential,” which has been interpreted to mean that employees need

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to have, among other things, a reasonable expectation that the communications at issue will remain private/confidential in order to preserve the privilege. \textit{Id.} at 724,733.

Whether such a reasonable expectation exists when employees use a company email system to communicate with their attorneys is determined by most courts using the four-factor balancing test set forth in \textit{In re Asia Global Crossing, Ltd.}, 322 B.R. 247 (Bankr. S.D.N.Y. 2005) (relying on principles from privacy law in developing the four-factor test). The four factors that courts consider are: (1) whether the employer maintains a policy banning personal use; (2) whether the employer monitors the use of the computer or emails; (3) whether third parties have a right of access to the computer or emails; and (4) whether the employer notifies the employee or the employee is aware of the use and monitoring policies. \textit{Id.} at 257.\footnote{Some courts have added a fifth factor to the test, inquiring also into how a particular employer interpreted its computer usage policy. See, e.g., \textit{United States v. Hatfield}, 2009 WL 3866300, at *9-10 (E.D.N.Y. Nov. 13, 2009); \textit{Deger v. Gillis}, 2010 WL 3732132, at *9 (N.D. Ill. Sep. 17, 2010) (referencing \textit{United States v. Hatfield} and its five factors).} \textit{In re Royce Homes}, 449 B.R. at 735-741, includes a useful summary and discussion of applicable case law since \textit{In re Asia Global Crossing}. After adopting the \textit{In re Asia Global Crossing} test, the \textit{Royce} court found that an employee had waived his privilege in certain emails sent from his employer’s email system because the employer had an explicit policy that prohibited the sending of confidential information from company computers and allowed the monitoring of employee communications on company equipment. \textit{In re Royce Homes}, 449 B.R. at 738-41. Whether monitoring actually occurred or whether the employee had actual notice of the policy was largely irrelevant because the “guidelines on monitoring were so explicit and straightforward that no employee could reasonably believe” that his or her emails would not be monitored. \textit{Id. See also Holmes v. Petrovich Dev. Co.}, 191 Cal. App. 4th 1047, 1068-72 (2011) (applying provisions of California Evidence Code similar to \textit{In re Asia Global Crossing} test but finding that communications that did not meet such test were not confidential to begin with, and thus no privilege applied).

12. \textbf{Communications about drafts and other matters disclosed in final form.}

There seems to be disagreement over whether drafts and other matters ultimately disclosed in final form should be protected as privileged. \textit{See generally PAUL R. RICE ET AL., I ATTORNEY-CLIENT PRIVILEGE IN THE UNITED STATES \S 5:12} (database updated June 2012).

Many courts protect drafts as privileged \textit{communications} between attorney and client, regardless of whether some of the substantive \textit{information} in such drafts loses its privileged status because of eventual publication, so long as these communications fulfill other privilege requirements. \textit{Id.}; see, e.g., \textit{Roth v. Aon Corp.}, 254 F.R.D. 538, 541 (N.D. Ill. 2009) (“So long as the initial legal advice sought from an attorney in legally formulating the drafts is made in confidence and protected by the client as confidential information without waiver, there is no apparent reason why the drafts should cease to be privileged once the final product becomes public. Indeed, most courts have found that even when a final product is disclosed to the public, the underlying privilege attached to drafts of the final product remains intact.”); \textit{R.J. Reynolds Tobacco Co. v. Premium Tobacco Stores, Inc.}, 2001 WL 1286727, at *5 (N.D. Ill. Oct. 24, 2001) (“[E]ven assuming, arguendo, that the final versions of the contract terms were presented to RJR’s sales staff in 1996, it is the substance of the communication between the lawyer and the client regarding the proposed terms that is protected, not the contract terms that ultimately appeared.”). Other courts, however, have found that drafts are “considered priv-

In contrast, if the “ultimate intended use” of a document is dissemination to others, some courts might not consider the attorney-client communication to be sufficiently confidential to be privileged. See RICE ET AL., ATTORNEY-CLIENT PRIVILEGE at § 5.12 n. 10 (citing United States. v. Naegle, 468 F. Supp. 2d 165, 171 (D.D.C. 2007) (“The Court concludes that draft bankruptcy filings are no more entitled to protection on the basis of privilege than are the filings actually made. By definition, they are not confidential communications between a client and an attorney; they and their contents are intended to be disclosed. They therefore are not protected from disclosure by the attorney-client privilege.”) (additional citations omitted). At least one treatise writer has argued that such privilege limitations do not make sense because clients do not relinquish confidentiality expectations in their communications with their attorney simply because they might eventually approve of or disseminate some final version of a draft to third parties. RICE ET AL., ATTORNEY-CLIENT PRIVILEGE at § 5.12. After all, “most client communications to an attorney about matters upon which litigation is anticipated are [in some sense] preliminary statements or ‘drafts’ of information that may ultimately be disclosed in the pleadings or at trial” and should not lose protection by virtue of labeling them one way or another. *Id.* Practitioners, however, will have to adjust to the law of their respective jurisdictions.

13. **Disclosures to government agencies and selective waiver.**

Companies under investigation have faced considerable pressure from government agencies, such as the SEC or the Department of Justice, to cooperate in an investigation by providing privileged information in order to obtain more favorable treatment. The companies often later maintain in related civil litigation that such cooperation should not constitute waiver of the privileged information for all purposes and should be deemed only a limited or “selective” waiver applicable to the investigation itself. The majority of jurisdictions have rejected the concept of selective waiver. *See In re Pac. Pictures Corp.*, 679 F.3d 1121 (9th Cir. 2012); *In re Qwest Commc’n’s Int’l Inc. Sec. Litig.*, 450 F.3d 1179 (10th Cir. 2006); *In re Columbia/HCA Healthcare Corp., Building Billing Practices Litig.*, 293 F.3d 289 (6th Cir. 2002). There may be fewer such situations in the future because the pressure on corporations to waive privilege has lessened. In August of 2008, the DOJ announced the withdrawal of its “McNulty Memorandum” and issued new corporate charging guidelines providing that credit for cooperation will not depend upon whether a corporation has waived privilege or work product protections (credit is supposed to depend on the disclosure of facts without regard to waiver) and prohibiting prosecutors from requesting the disclosure of non-factual attorney-client privileged communications and work product, except in cases involving the crime-fraud exception and the advice-of-counsel defense.³

³ In 2008, Rule 502 was added to the Federal Rules of Evidence. Although it does not change selective waiver issues, it ostensibly prevents a corporation’s voluntary waiver of certain privileged material in a government investigation from constituting a broader, subject-matter waiver of other previously undisclosed privileged materials, unless “they ought in fairness to be considered together.”

³ The DOJ’s revisions do not affect other agencies’ policies encouraging waiver.
Federal courts interpreting Rule 502(a) have noted that the rule did not alter the previous body of law regarding the appropriateness of subject-matter waiver in cases where a “privilege holder seeks to use disclosed material for advantage in the litigation but to invoke the privilege to deny its adversary access to additional materials that could provide an important context for proper understanding of the privileged materials.” *US Airline Pilots Assoc. v. Pension Benefit Guar. Corp.*, 274 F.R.D. 28, 32 (D.D.C. 2011) (quotations omitted). In addition, courts have held that a party’s reliance on the reasonable cause defense constitutes a subject matter waiver of work product and attorney-client protected materials related to the defense. *See New Phoenix Sunrise Corp. v. Comm’r*, 408 Fed. Appx. 908, 919 (6th Cir. 2010). Although Rule 502 does not provide for selective waiver, the rule does allow the party disclosing protected materials to control the timing of any waiver through the use of a protective order pursuant to Rule 502(d). *See In re Pac. Pictures Corp*, 679 F.3d at 129.


New Federal Rule of Evidence 502 also addresses inadvertent disclosure. Under Rule 502(b), an inadvertent disclosure does not operate as a waiver if the privilege holder took reasonable steps to prevent disclosure and promptly took reasonable steps to rectify the error. The enactment of Rule 502(b) has served to at least partially abrogate prior case law which held that any disclosure of privileged documents, even if inadvertent, resulted in waiver of the privilege. *See Williams v. District of Columbia*, 806 F. Supp. 2d 44, 48 (D.D.C. 2011). The commentary to Rule 502 points out that the rule is flexible enough to accommodate the multi-factor approaches courts have used, noting that many of the factors relate to the reasonableness of the producing party’s efforts to protect privileged information. The commentary further notes that Rule 502(d) contemplates enforcement of the so-called “claw-back” and “quick peek” arrangements which are designed to allow parties to agree on practical approaches to document productions without the risk of waiver. Rule 502(e) provides, however, that agreements between parties to limit the effect of waiver by disclosure can bind only the parties to the agreement unless the agreement is made part of a court order.

In addition, the American Bar Association’s Model Rule of Professional Conduct 4.4(b) requires a lawyer who receives a document relating to the representation of the lawyer’s client to promptly notify the sender if the lawyer knows or reasonably should know that the document was inadvertently sent. A majority of jurisdictions have adopted a version of Model Rule 4.4(b). The only states which have not adopted Rule 4.4(b) are California, Georgia, Hawaii, Massachusetts, Michigan, North Dakota, Texas, Virginia, and West Virginia.
§ 908.045(2)

STATEMENT OF RECENT PERCEPTION. A statement, not in response to the instigation of a person engaged in investigating, litigating, or settling a claim, which narrates, describes, or explains an event or condition recently perceived by the declarant, made in good faith, not in contemplation of pending or anticipated litigation in which the declarant was interested, and while the declarant's recollection was clear.
IN UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

UNITED STATES OF AMERICA

v.

WILLIAM R. CLEMENS,

Defendant.

Criminal No. 10-223 (RBW)

PROVISIONALLY FILED
UNDER SEAL

DEFENDANT'S OPPOSITION TO
GOVERNMENT'S MOTION IN LIMINE TO PRECLUDE EVIDENCE,
COMMENT, AND ARGUMENT REGARDING
GOVERNMENT WITNESS'S PRIOR BAD ACTS

Defendant William R. Clemens, by and through his attorneys, respectfully submits this
response in opposition to the Government’s Sealed Motion In Limine regarding Brian McNamee.
The Government filed a similar, unsealed motion before the initial trial, but it is now attempting
to use the benefit of additional time and discovery it gained after the mistrial to preclude a much
broader range of potential testimony. As discussed below, the prosecution’s secret\(^1\) campaign to
shield its star witness from legitimate cross-examination should be denied.

INTRODUCTION

Brian McNamee is the only person in the entire world who has ever said that he
witnessed Mr. Clemens use steroids or human growth hormone at any time in his storied career.
But Mr. McNamee’s past also contains more dirt than a pitcher’s mound. As the Government
acknowledges through the lengths it is taking to secretly protect him, Mr. McNamee is a serial
liar who has engaged in myriad episodes of relevant misconduct.

\(^1\) The Government’s most recent motion was filed under seal, and Mr. Clemens has filed a
separate opposition to that motion.
Before the first trial in this matter, the Government filed a motion *in limine* to preclude evidence, comment, and argument regarding Mr. McNamee’s involvement in the 2001 drugging and sexual assault of a woman in Tampa and his subsequent lies to Florida police investigators. See D.E. 51. Mr. Clemens opposed the motion *in limine*, see D.E. 66, and the Court heard argument in open court on the facts surrounding the Florida incident and investigation and the applicability of Rules of Evidence 403, 404(b), and 608(b). The Court ended up reserving a final ruling on the Government’s motion “until defense counsel raises with the Court anew the admissibility of this evidence” during trial. See July 5, 2011 Hearing Tr. at 36:1–6 & D.E. 76.

Around the time the Court declined to grant the prosecutors’ motion, the Government made a series of discoveries that further eroded Mr. McNamee’s credibility and were quickly followed by the Government causing a mistrial. The timeline regarding Mr. McNamee alone before and after the mistrial is striking:

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2 Of course, if the Government would have approached Mr. McNamee with the professional degree of skepticism required in a proper investigation, many of these facts would have been uncovered long before Mr. Clemens was ever indicted. The defense believes that the prosecution has disclosed *Brady* material in its possession, but this disclosure record is misleading because the Government has made a conscious decision not to investigate areas the prosecutors believe will lead to exculpatory information. For example, the Government has known about the Florida state investigation file for years, which includes direct evidence from third-party witnesses contradicting the version of events Mr. McNamee is still using today, yet, as shown below, it did not choose to follow up on that file until the Court indicated that some facts regarding the 2001 Florida incident may be admitted in trial.

It is improper for the Government to deliberately put its head in the sand in an effort to avoid discovery (and production) of exculpatory information. Prosecutors have a duty to determine whether a key witness such as Mr. McNamee is providing false testimony in aid of an indictment and prosecution and to correct that testimony. See *United States v. Mejia*, 597 F.3d 1329, 1338 (D.C. Cir. 2010) (“[T]he government may not knowingly use false testimony [] to obtain a tainted conviction.”) (quoting *Napue v. Illinois*, 360 U.S. 264 (1959)); *Wei Su v. Filion*, 335 F.3d 119, 126 (2d Cir. 2003) (“Since at least 1935, it has been the established law of the United States that a conviction obtained through testimony the prosecutor knows to be false is repugnant to the Constitution.”); see also H. Schulte, Report to Hon. Emmet G. Sullivan of Investigation Conducted Pursuant to the Court’s Order, dated April 7, 2009, at 19–20, 470, 475–
• On June 24, 2011, both the Government and defense counsel received a 292-page manuscript written by Mr. McNamee “in his own words” for the first time. Three chapters (48 pages) of the manuscript deal with the Florida incident and its “aftermath” (“Leaving New York,” “Pool Aftermath,” and “2002 – Investigation”).

• On June 24, 2011, DLA Piper produced internal notes and memoranda drafted in connection with interviews of Mr. McNamee to defense counsel only.

• On July 13, 2011, less than one week after the Court’s written order holding in abeyance a decision on the admissibility of the Florida incident, FBI agents deployed by the prosecution conducted their very first interview into the 2001 allegations against Mr. McNamee. In that interview, the night manager and security representative for the hotel where the female victim was drugged and raped told the FBI the same thing he had said to Florida investigators at the time and representatives for defense counsel sixteen months earlier in February 2010: the manager saw Mr. McNamee in the pool with an unconscious or nearly unconscious victim appearing to have sexual intercourse.

• On July 14, 2011, the day after the interview regarding Mr. McNamee’s conduct was transcribed, the Government published evidence in violation of the Court’s pretrial orders, and the Court declared a mistrial.

• In August 2011, both the Government and defense counsel received personnel records from the New York Police Department documenting misconduct by Mr. McNamee that resulted in disciplinary action.

• On September 6, 2011, the Court denied Mr. Clemens’s motion to dismiss the case on double jeopardy grounds.

• On September 20, 2011, two weeks after the Court’s order, FBI agents conducted their first interview of the security officer for the New York Yankees at the time of the 2001 incident in Florida. The Yankees security officer told the agents that, on the night of the rape, Mr. McNamee asked the security officer to “get rid of” a plastic water bottle near the pool where Mr. McNamee was found naked with the incoherent victim. That water bottle contained GHB that had drugged the woman.

• On September 22, 2011, FBI agents conducted a follow-up call with Mr. McNamee regarding the 2001 Florida incident and other matters. McNamee shifted responsibility to a different Yankees staff member and said for the first time that the staff member was the one who gave Mr. McNamee GHB.

76 & 503–07 (special prosecutor findings of misconduct in connection with the investigation and prosecution of U.S. Senator Ted Stevens).
Rather than fold its cards in the face of this and possibly other potential impeachment evidence, the Government has now doubled down in its efforts to shelter Mr. McNamee. In its most recent motion in limine, the Government again seeks to preclude evidence of the 2001 Florida incident and investigation at trial. See Motion In Limine filed on Mar. 19, 2012 provisionally under seal ("Motion") at 7–8. This time, however, the Government also seeks an order precluding references to eight other categories of evidence regarding Mr. McNamee at trial: police misconduct at the NYPD (Id. at 8–11), purported substance abuse and addiction (Id. at 11–12), a conviction for driving while intoxicated (Id. at 12 n.3), indebtedness and collection actions (Id. at 12–13), tax fraud (Id. at 13–14), prescription drug fraud and distribution (Id. at 14), loan fraud (Id. at 14–15), and [REDACTED] (Id. at 15 n.4). The alleged source of this potential impeachment evidence—and the hook used by the Government to attempt to hide its motion in limine from the public—is a selection of divorce filings from a 2010 proceeding which were produced by the Government on December 3, 2010.

The Government’s secret, newly-enhanced motion to suppress the defendant’s Sixth Amendment right to confront his principal accuser should not be granted for the same reasons as the Government’s initial motion. First, the motion is premature. Neither the foundation for, nor the full context of, the disputed testimony regarding the nine topics identified in the Government’s motion has been presented to the Court at this stage. Mr. Clemens again acknowledges that this evidence, like all evidence, is not admissible until it becomes relevant and a proper foundation is laid, and he is prepared to proceed on both fronts once Mr. McNamee and other relevant witnesses are presented at the retrial. Mr. Clemens also will abide by the Court’s ruling before the first trial regarding references to the Florida incident during opening statements. Yet the Government seeks an in limine ruling permanently barring such evidence from the trial.
before the Court has heard any evidence at all. Just like before the first trial, the Court should decline to do so.

Second, the Government is wrong on the merits. The Government’s motion presents nine different contexts in which its star witness has been accused of, proven to commit, or admitted to: providing false testimony, obstruction of justice, fraud, substance abuse and addiction, gross delinquency, police misconduct, [REDACTED], driving while intoxicated, drug dealing, loan fraud, tax fraud, forgery, and rape. See Motion at 2. The Government understandably seeks a ruling that such evidence should be “off-limits” and “may not be pursued during any cross-examination of Mr. McNamee,” id., but the only reason offered is that Mr. McNamee’s prior bad acts do not relate to “truth-telling probativeness.” Id. at 15. This argument is wrong, of course—it is difficult to conceive of an act more probative to truthfulness than, e.g., lying to law enforcement officials conducting a felony criminal investigation—but it is also fatally myopic. Under Federal Rule of Evidence 404(b), evidence of a witness’s prior bad acts may be admissible for many “other purposes” besides character for truthfulness, including “proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.” See Fed. R. Evid. 404(b). This is especially true when, as here, the witness at issue is the key witness for the prosecution. See United States v. Fonseca, 435 F.3d 369, 375 (D.C. Cir. 2006).

Finally, the Court should decline to reward the Government for its own conduct that caused a mistrial at great expense to Mr. Clemens, this Court, and this district. The Government’s violation of this Court’s in limine orders was an affront to the judicial process. Yet the Government has now filed a second motion in limine about Mr. McNamee that is far more extensive than the motion it filed before the first trial. As the timeline shows, and just as
Mr. Clemens predicted, the Government has used the extra time it “earned” through its own failures to attempt to shore up its case by further investigation and now expanded motions in limine. Mr. Clemens is forced to defend against these tactics and pay even more fees to do so when his trial should have been conducted fairly and to completion last summer. How is this fair to the accused? The Government’s motion should be denied.

ARGUMENT

In the event the Court feels it has a sufficient basis to rule on the admissibility of “other acts” evidence at this time rather than after testimony and evidence are introduced at trial, the Court should deny the Government’s second attempt to shield Mr. McNamee from a full cross examination for four reasons: (1) the Government incorrectly focuses its motion on the sole question of whether unflattering evidence regarding Mr. McNamee relates to truthfulness, rather than other recognized justifications for admission; (2) each of the potential impeachment facts is admissible; (3) neither Rules 403 nor 608(b) preclude admission of the potential impeachment facts; and (4) the Government’s motion itself is the unfair fruit of prosecutorial conduct resulting in a mistrial.

I. The Government’s Motion Applies The Wrong Admissibility Criteria.

In its new motion, the Government argues that the “threshold criterion” for determining whether Mr. Clemens should be allowed a full cross-examination of his accuser or not is “truthtelling probativeness.” See Motion at 15. In other words, the Government would have this Court base its in limine decision solely on whether each of the unsavory categories of actions in Mr. McNamee’s past are indicative of a character for “untruthfulness.” See id. at 3–6. The
Government is wrong. The approach it espouses is overly restrictive, particularly with respect to a key witness like Mr. McNamee.¹

"Other act" evidence can be admitted at trial for other reasons besides proving or disproving a witness's character for truthfulness. For example, both the U.S. Supreme Court and this Court have admitted evidence that is deemed necessary to facilitate a litigant's ability to tell an integrated and natural story at trial without gaps. See Old Chief v. United States, 519 U.S. 172, 188–89 (1997); United States v. Esquivel, 755 F. Supp. 434, 439 (D.D.C. 1990) (finding evidence of other acts may be necessary and admissible if it "forms an integral and natural part of an account of the crime, or is necessary to complete the story of the crime for the jury"); see also United States v. Sampol, 636 F.2d 621, 659 (D.C. Cir. 1980) (admitting evidence because it showed how the relationship between the defendant and an alleged co-conspirator "began and matured"). Under the rationale in Old Chief and Esquivel, this Court could decide to admit some or all of the impeachment evidence featured in the Government's new motion in order to avoid the creation of a "gap[] of abstraction" with the jury and an unfair break in the natural sequence of important narrative evidence. See Old Chief, 519 U.S. at 189.

The potential impeachment evidence identified in the Government's motion may also become admissible under Federal Rule of Evidence 404(b) for purposes other than inquiring into Mr. McNamee's untruthful character. The Government only devotes one sentence in its motion

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¹ Mr. McNamee's role as a key witness for the Government means that the Court should consider the relief the Government requests with caution. See Fonseca, 435 F.3d at 375 ("[W]here a party is seeking to impeach a witness whose credibility could have an important influence on the outcome of the trial, the district court should be cautious in limiting cross-examination."); see also Harbor Ins. Co. v. Schnabel Foundation Co., 946 F.2d 930, 935 (D.C. Cir. 1991). Mr. Clemens raised the same point in response to the Government's initial motion in limine regarding Mr. McNamee, and it was not rebutted.
to Rule 404(b), and that sentence quoted just the first part of the Rule. See Motion at 3. But the entire text of the Rule provides:

Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action 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 . . . .

Fed. R. Evid. 404(b) (emphasis added). Indeed, Rule 404(b) is one of “inclusion rather than exclusion.” United States v. Cassell, 292 F.3d 788, 792 (D.C. Cir. 2002). If “other acts” evidence is relevant and “relates to something other than character or propensity,” then the evidence should be admitted subject to other “general strictures limiting admissibility” such as Rule 403. Id.; see also United States v. Douglas, 482 F.3d 591, 600 (D.C. Cir. 2007). The Court also has discretion to admit such evidence first without making any finding and then later instruct the jury to disregard such evidence if the proffering party fails to sufficiently link the evidence to a purpose other than character or propensity. See Huddleston v. United States, 485 U.S. 681, 690 (1988).

II. Each Of The Prior Bad Acts Will Be Shown To Be Admissible At Trial.

When the Court considers a full range of potential bases for admissibility, every one of the categories of Mr. McNamee’s “prior bad acts” can be seen to be competent evidence at trial. In addition, as noted for each act below and as applies to the pending motion to seal, evidence regarding nearly every act can be introduced through non-private documents other than the confidential divorce proceedings.
A. 2001 Florida Incident And Obstruction.\footnote{The facts regarding the 2001 Florida incident and investigation are set forth in police investigation records obtained by defense counsel through independent efforts. The police investigation records were also produced by the Government in discovery on August 30, 2010, over four months before the Government produced the McNamee divorce records that also make an oblique reference to the 2001 Florida affairs. Of course, the investigation records themselves were created beginning in October 2001, nearly nine years before the earliest of the McNamee divorce records was filed.}

As discussed in more detail in Mr. Clemens's June 29, 2011 response to the initial motion \textit{in limine} regarding Mr. McNamee, the evidence will show that in 2001, the last year Mr. McNamee contends he injected Mr. Clemens with performance enhancing drugs and the same year in which he also contends he saved so-called physical evidence of an injection he gave Mr. Clemens, Mr. McNamee repeatedly lied to law enforcement officials conducting a felony criminal investigation in Florida. The investigation concerned a woman who met Mr. McNamee and others at a post-game gathering of New York Yankees players and personnel (other than Mr. Clemens) at a hotel in St. Petersburg, Florida on October 6, 2001, and the circumstances by which she was rendered incoherent from unknowingly ingesting the “date rape” drug GHB and was found naked and intertwined with Mr. McNamee in the hotel swimming pool later that night. During the subsequent criminal investigation, the Government concedes, as it must, that Mr. McNamee provided false statements to Florida law enforcement officials who were investigating the rape incident. \textit{See} Motion at 7. Mr. McNamee lied to investigating police officers regarding his involvement in the sexual assault, his relationship to the Yankees, and his knowledge of other Yankee personnel at the hotel that night. Mr. McNamee also obstructed with evidence by attempting to tamper with the water bottle containing GHB at the crime scene. Indeed, there is no question that Mr. McNamee committed obstruction of justice in the Florida rape investigation—the very crime the Government seeks to convict Mr. Clemens of in this case.
Although the relevance of these facts to Mr. McNamee’s character for truthfulness is obvious, evidence of the Florida incident and investigation should also be admissible because it is fundamental to the defense narrative and because it provides a motive and plan under Rule 404(b) for Mr. McNamee to fabricate so-called physical evidence and lie to federal investigators. For example, the New York Yankees elected not to renew Mr. McNamee’s contract as Assistant Strength and Conditioning Coach after the team became aware of the investigation, and Mr. McNamee told federal investigators and attorneys involved in the creation of the Mitchell Report that Mr. McNamee believed that Mr. Clemens’s trust in Mr. McNamee “went down” after the incident. In addition, Mr. Clemens will present evidence that will show Mr. McNamee was obsessed by his role in the Florida investigation and his perception that he was mistreated by law enforcement and the media through at least 2009, when he wrote his book, and it influenced his interaction with law enforcement and DLA Piper in 2007 and 2008. Further, the defense will show that Mr. McNamee has continued to commit obstruction of justice and perjury by lying to the federal grand jury about his role in the Florida rape case.

In the face of proof that Mr. McNamee has lied to law enforcement and a federal grand jury, the Government’s solution is to seek to preclude the evidence instead of indicting Mr. McNamee for a crime. This selective approach to the facts should fail. It is difficult to imagine what would be more relevant to the defense under Rule 404(b) than evidence that Mr. McNamee minimized his own involvement in questionable activities, shifted blame for that conduct to innocent acquaintances, and then lied to law enforcement about that conduct and the physical evidence related to it. Mr. Clemens should therefore be entitled to fully present these events and to place them in context without preemptive restriction.
B. Misconduct As A New York City Police Officer.\textsuperscript{5}

The evidence will show that Mr. McNamee engaged in at least three actions during his time on the New York City police force that are likely to be relevant at trial: (i) he misplaced an issued weapon and other equipment then lied to supervisors in order to reduce his possible punishment and degree of perceived culpability; (ii) he tampered with evidence at a crime scene by putting a “discarded beer can” in the hand of a female corpse and then lied to a supervisor when asked about it; and (iii), taking Mr. McNamee’s version of events as true, he lied to cover up a supervisor’s failure to adequately oversee the suspect charged to Mr. McNamee’s care. See Motion at 8. Despite the strident statements to the contrary in the Government’s motion, see id. at 9, these facts are plainly probative of Mr. McNamee’s character for truthfulness or untruthfulness, and may therefore be inquired into on cross-examination under Rule 608(b)(1). For example, the fact that Mr. McNamee lied when confronted with his use of a beer can to tamper with physical evidence does indeed “relate to Mr. McNamee’s ability to tell the truth.” Id. Likewise, although the “innocent mistake” of losing one’s weapon may not directly indicate a character for untruthfulness, the fact that Mr. McNamee lied about the circumstances in which he lost that weapon does indicate such a character. See id. Further, lying for the purpose of protecting a supervisor remains probative of truthfulness regardless of whether the motivation for that lie was noble or not. Mr. Clemens should therefore be entitled to inquire into these events without preemptive restriction.

\textsuperscript{5} The facts regarding Mr. McNamee’s employment record as a police officer are set forth in Mr. McNamee’s autobiographical manuscript, NYPD personnel records, and interview memoranda generated by federal agents working with the prosecution. Defense counsel obtained both the manuscript and NYPD personnel records through subpoenas and other independent efforts. The Government did nothing for years to obtain these records, surely wishing they would never see the light of day. The McNamee divorce records do not contain any information not otherwise found in these other sources.
The cases cited by the Government from other jurisdictions do not compel a different conclusion. Only one of the Government’s cases, the unpublished decision in *United States v. Beltran-Garcia*, deals with a prior action with any bearing on truthfulness or untruthfulness (whether an officer witness conducted an excessive search contrary to order and whether the officer inadequately reported that search and the related arrest). In *Beltran-Garcia*, the Tenth Circuit actually agreed with defendant-appellants that the police officer witness’s past misconduct had “some tendency to reflect on his character for truthfulness,” but it ultimately affirmed exclusion of the evidence at trial based on a finding that the trial court did not abuse its discretion to balance the probative nature of the evidence against factors set forth in Rule 403. 338 Fed. Appx. 765, 771–72 (10th Cir. 2009) (unpub. op.). Because the Government in this case is unwilling to even acknowledge that Mr. McNamee’s lies as a police officer bear on his character for truth-telling, the unpublished *Beltran-Garcia* case actually supports Mr. Clemens’s argument to the extent it is persuasive to this Court at all.6

The Government also makes much of the fact that Mr. McNamee may or may not have been disciplined for some of his misconduct, see Motion at 9, but this argument is a smoke screen. Mr. Clemens does not intend to introduce the fact that Mr. McNamee was disciplined by the NYPD during cross-examination. Indeed, the employment implications of his actions have nothing to do with whether the actions themselves are probative of Mr. McNamee’s character for

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6 The other cases cited by the Government are clearly distinguishable. Unlike Mr. McNamee, the witnesses sought to be cross-examined in those cases were never alleged to have lied or otherwise acted in a way that was probative of truthfulness or untruthfulness. *See United States v. Smith*, 277 Fed. Appx. 870, 872–73 (11th Cir. 2008) (unpub. op.) (affirming exclusion of impeachment evidence regarding witness’s past criticisms of police practices unrelated to the defendant’s offense); *United States v. Kissinger*, 943 F.2d 50, 1991 WL 173042, at *2–3 (4th Cir. 1991) (per curiam; unpub. op.) (affirming exclusion of evidence that witness had engaged in cross-burning); United States v. Williams, 464 F.3d 443, 446 (3d Cir. 2006) (affirming exclusion of unverifiable cross-examination questions that witness had committed an unrelated murder).
truthfulness. In other words, the fact that Mr. McNamee’s admitted lies may have been successful enough to skirt a reprimand does not make those lies any less probative on cross-examination.

C. Substance Abuse And Addiction.\footnote{The facts regarding Mr. McNamee’s substance abuse and addiction are set forth in police records and have been discussed in various witness interviews. Defense counsel obtained the police records and witness interviews through subpoenas and other independent efforts. The McNamee divorce records do not contain any information not otherwise found in these other sources.}

The evidence will show Mr. McNamee’s addiction to a mind-numbing array of "[redacted]", he injected Mr. Clemens with performance enhancing drugs and saved so-called physical evidence of such an injection. Mr. McNamee’s drug use continued to impact his mental and physical faculties through late 2007, after he had been confronted by federal investigators determined to obtain a confession from Mr. McNamee regarding Mr. Clemens. During the intervening period, Mr. McNamee also allegedly maintained and secreted the so-called physical evidence of an injection given to Mr. Clemens.

Evidence of Mr. McNamee’s substance use and abuse should be admissible regardless of whether it may be probative of untruthfulness because it is fundamental to the defense narrative and because it bears directly on motive, plan, and opportunity under Rule 404(b). For example, Mr. Clemens will present evidence that will show Mr. McNamee was so obsessed by his role in the Florida investigation and his perception that he was under close scrutiny by the New York Yankees that he rendered himself incoherent and convulsive after taking unknown substance matching the description of GHB in a Seattle hotel bar in October 2001. Further, it is during this difficult and drug-addled period that the Government will presumably seek to show that Mr.
McNamee allegedly collected the so-called physical evidence from Mr. Clemens. Mr. Clemens should be entitled to inquire fully into the circumstances surrounding a process that is so critical to the prosecution. See United States v. Kinnard, 465 F.2d 566, 567–68 (D.C. Cir. 1972) (district court erred by restricting defense counsel’s efforts on cross-examination to impeach the credibility of an informant by use of extrinsic evidence to prove the frequency of his drug use and the most recent occurrence of such use).

Moreover, despite the Government’s callous statement that “defendant has never suggested that Mr. McNamee’s purported substance abuse somehow undermined McNamee’s ability to perceive the critical events,” see Motion at 11, the evidence at trial may very well support just such a conclusion. This type of impairment is classic cross-examination and should not be precluded during trial, much less now. Because Mr. Clemens does not have access to the Government’s star witness in preparation for the upcoming trial, the Court should grant the defense enough leeway to form conclusions and arguments based on the evidence that is admitted at trial.8

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8 The out-of-jurisdiction cases cited by the Government do not undermine this point. See United States v. Clemons, 32 F.3d 1504, 1511 (11th Cir. 1994) (finding trial court’s admission of co-defendant drug use to be erroneous because, unlike here, “[t]he relevance of this line of questioning was never demonstrated”); United States v. Holden, 557 F.3d 698, 703 (6th Cir. 2009) (affirming trial court’s exclusion of long period of drug treatment by witnesses, but also condoning cross examination regarding witness’s coherence during four-years at issue in suit); United States v. Wilson, 244 F.3d 1208, 1218 (10th Cir. 2001) (finding trial court’s admission of defendant drug use by the prosecution to be erroneous but harmless); and United States v. Turner, 104 F.3d 217, 222–23 (8th Cir. 1997) (affirming trial court’s exclusion of instance of drug use because the alleged activity “was unrelated to [the defendant] or the offense for which he was tried”).
D. Indebtedness.²

The evidence will show that Mr. McNamee was in such serious financial straits in 2003 and 2004—important years between the time Mr. McNamee allegedly injected Mr. Clemens with steroids and HGH and the time Mr. McNamee provided a series of purported confessions to federal agents—that Mr. McNamee failed to pay over $40,000 in legal fees connected with the Florida investigation discussed above. The evidence will also show that Mr. McNamee was sued in August 2007 for non-payment of a $50,000 loan, the very same time period Mr. McNamee was interviewed four times by DLA Piper and government prosecutors and agents. Mr. Clemens acknowledges that indebtedness alone is not generally indicative of untruthfulness, but these specific debts are nonetheless admissible because, inter alia, the degree to which Mr. McNamee was destitute and desperate in the time period leading up to the federal investigation of Mr. Clemens is relevant to Mr. McNamee’s motive to lie to federal investigators and/or to sensationalize his accusations in order to gain fame and fortune. Evidence of indebtedness may also be relevant to rebut the suggestion by the Government that Mr. McNamee was well compensated for distributing performance enhancing drugs to Mr. Clemens. Therefore, Mr. Clemens should be entitled to inquire about Mr. McNamee’s financial difficulties to show motive and bias.

The Government’s reliance on United States v. Lanza to categorically preclude evidence of debts is misplaced. In that case, the question posed to the New York district court and the Second Circuit Court of Appeals was whether loans and debts unrelated to the defendants shed

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² The facts regarding Mr. McNamee’s accounts in arrears and financial struggles are set forth in, inter alia, unsealed civil proceeding documents and public news accounts. Defense counsel obtained documents from the civil suit and newspaper though independent efforts. The McNamee divorce records do not contain any information not otherwise found in these other sources.
light on the witness’s credibility. See 790 F.2d 1015, 1019–20 (2d Cir. 1986). The Lanza court was not faced with the potential basis for admissibility here—whether Mr. McNamee’s financial condition provided a motive to lie or exaggerate claims regarding Mr. Clemens for potential gain. Indeed, the trial court in Lanza actually permitted questioning regarding the witness’s financial relationship with defendant and his financial condition “during the period of the alleged illegal activities,” id. at 1020, which suggests that the trial court would have also permitted the questioning Mr. Clemens may wish to conduct here.

E. Driving While Intoxicated. 10

Evidence of instances where Mr. McNamee drove while intoxicated between the time he contends he injected Mr. Clemens with performance enhancing drugs the time he had been confronted by federal investigators determined to obtain a confession Mr. Clemens, is relevant for the same reason Mr. McNamee’s self-destructive drug use and financial difficulties are relevant. Driving while intoxicated may not be probative of untruthfulness, but it is fundamental to the defense narrative and bears directly on motive, plan, and opportunity under Rule 404(b). For example, Mr. Clemens will present evidence that will show that Mr. McNamee was so obsessed by his role in the Florida investigation and his perception that he was under close scrutiny by the New York Yankees that he rendered himself incoherent on numerous occasions after October 2001. Further, it is during this difficult and drug-addled period that the Government will presumably seek to show that Mr. McNamee allegedly collected the so-called physical evidence from Mr. Clemens. Mr. Clemens should be entitled to inquire fully into the circumstances surrounding this critical process to the prosecution.

10 The facts regarding Mr. McNamee’s DWIs are set forth in unsealed criminal records. Defense counsel obtained these materials through subpoenas and other independent efforts. The McNamee divorce records do not contain any information not otherwise found in these other sources.
Mr. Clemens acknowledges that such a crime would not generally indicate untruthfulness in a vacuum, but the potential reason why Mr. McNamee could be extremely relevant. The chain-of-custody of Mr. McNamee’s so-called physical evidence implicating Mr. Clemens, which was purportedly stored at Ms. McNamee’s home, will be a hotly disputed issue at trial. Mr. McNamee’s access to that evidence is relevant for reasons that do not implicate credibility and truthfulness at all. Accordingly, Mr. Clemens should be entitled to ask both Mr. McNamee and Ms. McNamee about the circumstances surrounding at trial.

G. Tax Fraud.12

In its motion, the Government attempts to minimize statements by Mr. McNamee that he may have misreported hundreds or “a thousand” dollars in past income tax returns. See Motion at 13–14. But such actions, if intentional, certainly are probative of truthfulness or untruthfulness. The lone case cited by the Government does not say otherwise. In United States v. Townsend, the Fifth Circuit affirmed the trial court’s decision to preclude cross-examination of a government witness regarding that witness’s “bad business practices,” including “fail[ing] to timely pay his bills, ‘bounc[ing]’ checks, and [selling] substandard gasoline.” 31 F.3d 262, 269

11 Mr. Clemens has not yet been provided any basis for this past act other than sworn statements attached in Eileen McNamee’s divorce filings. That would change if Ms. McNamee testifies during trial.

12 As indicated in the Government’s motion itself, the facts regarding Mr. McNamee’s tax filing practices are set forth in interview memoranda prepared through independent efforts of defense counsel. Those materials were prepared years before the McNamee divorce records ever existed.
(5th Cir. 1994). Although the defendant in *Townsend* tried, and failed, to link the witness to the defendant's alleged tax scheme, the Government is wrong to suggest that Court’s affirmation of the evidentiary ruling turned on a finding that the witness merely submitted isolated improper tax returns.

In addition, if Mr. McNamee lied on tax returns in an attempt to avoid liability and retain greater funds, it stands to reason that Mr. McNamee was struggling to make ends meet. Again, this financial condition is relevant to whether Mr. McNamee had a motive to lie to federal investigators and/or to sensationalize his accusations in order to gain fame and fortune. Accordingly, Mr. Clemens should be entitled to ask both Mr. McNamee and Ms. McNamee about the circumstances surrounding this secret entry at trial.

**H. Loan Fraud.**

In its motion, the Government concedes that evidence showing that Mr. McNamee forged his wife’s name on a loan document in the amount of $50,000 would be “relevant to Mr. McNamee’s credibility.” See Motion at 14–15 (citing cases). Nonetheless, the Government attempts to hide behind Rule 608(b) to argue that the defense should not be allowed to inquire about the alleged forgery for fear of stirring up “an obviously acrimonious divorce proceeding.” *Id.* at 15. But even if this argument had merit, which it does not, the Government’s motion fails to see that Mr. McNamee’s act of forgery and loan fraud is also admissible under Rule 404(b). As with other financial circumstances evidence discussed above, the fact that Mr. McNamee was

13 Unlike the cases cited by the Government, Mr. McNamee’s loan fraud is not just an allegation in a civil complaint. The evidentiary predicate is Ms. McNamee’s sworn affidavit testimony. It is therefore unfair to categorize this incident as the byproduct of “acrimonious divorce proceedings.” See D.E. at 15. As the Government well knows, but did not disclose to the Court, Ms. McNamee went to court and protected her legal rights in connection with Mr. McNamee’s forgery and loan fraud. This entire incident is fully documented in the court file, and Mr. McNamee has never disputed that he did exactly what his wife said he did.
so destitute that he would stoop to forging his wife’s name is relevant to Mr. McNamee’s motive to lie to federal investigators and/or to sensationalize his accusations in order to gain fame and fortune. Therefore, Mr. Clemens should be entitled to inquire about Mr. McNamee’s loan fraud just as much as other financial difficulties to show motive and bias.

I. Prescription Drug Fraud.\textsuperscript{14}

Finally, the evidence will show that Mr. McNamee conspired with doctors he never met in person to receive prescription drugs \ldots See Motion at 14. Although the Government attempts to breeze past this behavior and conflate it with Mr. McNamee’s forgery of loan documents, the extent to which Mr. McNamee participated in a drug-dealing scheme \ldots is relevant on several fronts, including propensity for truthfulness. For example, Mr. McNamee’s involvement in a drug enterprise may very well show that he had other reasons to know witnesses like Kirk Radomski having nothing to do with Mr. Clemens and/or that Mr. McNamee himself was in a state of pharmaceutical delusion and dependence at critical periods of the defense narrative. Mr. Clemens should be entitled to inquire fully about this set of acts.

In light of the obvious relevance, see Motion at 14, the Government resorts to an argument that Mr. Clemens should not be permitted to inquire into Mr. McNamee’s role in a prescription drug fraud and sales ring because the defense has not “show[n] he is in possession of facts which support a genuine belief that Mr. McNamee committed these offenses.” See \textit{id. at

\textsuperscript{14} The facts regarding Mr. McNamee’s involvement in a prescription drug ring are set forth in news accounts and criminal prosecution materials produced only after the defense repeatedly pressed for disclosure. After dragging its heels, the Government grudgingly made partial disclosures. The defense remains concerned about a potential \textit{Brady} violation on this topic but believes the best course will be to pursue the matter through full and fair cross-examination. The McNamee divorce records do not contain any information not otherwise found in these other sources.
15. This argument is, at best, more sloppiness from a prosecution team that continues, by its conduct, to undermine Mr. Clemens’ right to a fair trial. At worst, the Government’s position is a willful attempt to mislead the Court.

The Government knows that Mr. McNamee was investigated as part of a wide-ranging federal investigation of prescription drug “straw man” prescriptions. The investigation was conducted by the U.S. Attorney’s Office for the Northern District of Iowa, and it showed unequivocally that Mr. McNamee was illegally procuring prescriptions through bogus prescriptions. Mr. McNamee was not charged, but the doctors from whom he was obtaining unlawful prescriptions were. Thus continued Mr. McNamee’s pattern of engaging in unlawful activity but escaping sanction at the whim of law enforcement.

What is remarkable about these facts is not that Mr. McNamee broke the law, again, but rather that the Government would fail to disclose to the Court the existence of the Iowa investigation. This is not fair to the Court and it is not fair to Mr. Clemens.

III. Rule 403 Nor Rule 608(b) Preclude Admission of the Evidence.

The Government periodically asserts two additional grounds for precluding potential cross-examination evidence regarding Mr. McNamee in its motion, but neither is sufficient to overcome the analysis above and justify an in limine ruling.

First, the Government makes a passing reference to Federal Rule of Evidence 403 in connection with the admissibility of evidence that Mr. McNamee manipulated a corpse and, more importantly, altered a crime scene and lied about it while serving as a New York City
police officer. See Motion at 10 & 11 n.2 (arguing that such an incident is so remote in time that
“its minimal probative value is substantially outweighed by the danger of unfair prejudice”).
The Government fails to explain, however, that the balance of any Rule 403 inquiry “tilts”
toward the admission of evidence in cases like this one. See United States v. Whitmore, 359 F.3d
609, 619 (D.C. Cir. 2004). The D.C. Circuit put it best in United States v. Gartmon:

Rule 403 does not provide a shield for [witnesses] who engage in outrageous acts, permitting only the crimes of Caspar Milquetoasts to be described fully to a jury. It does not generally require [a litigant] to sanitize its case, to deflate its witnesses' testimony, or to tell its story in a monotone. It does not bar powerful, or even “prejudicial” evidence. Instead, the Rule focuses on the “danger of unfair prejudice,” and gives the court discretion to exclude evidence only if that danger “substantially outweigh[s]” the evidence's probative value.

146 F.3d 1015, 1021 (D.C. Cir. 1998) (citations omitted, emphasis in original).

The Court should not exclude the evidence in question here under Rule 403. The probative value of evidence showing that Mr. McNamee tampered with evidence and then lied about it to save his own hide is beyond serious question. The same is obviously true about Mr. McNamee’s lying to a grand jury about the same matter. And the Government’s argument that the events while Mr. McNamee was serving as a police officer in the 1990s happened “almost two decades ago” actually support Mr. Clemens’s position that bringing those events to light briefly during trial would not be unfairly prejudicial to Mr. McNamee because Mr. McNamee’s ties to the department are so distant. Moreover, it is not credible to argue that Mr. McNamee’s balanced interests favor preclusion from the public record when the facts into which defense counsel seeks to inquire at trial come from an autobiographical manuscript Mr. McNamee would no doubt like to publish to as broad an audience as possible. Accordingly, Rule 403 should not be used to protect Mr. McNamee from full and fair cross-examination.
Second, the Government goes to some lengths to explain the parameters by which Federal Rule of Evidence 608(b) may or may not apply to some of Mr. McNamee’s unseemly past acts. See Motion at 3–6. The Government’s discussion of “broad,” “narrow,” and “middle” views of interpreting Rule 608(b), however, fails to mention that courts in this Circuit apply that Rule narrowly with respect to testimony to be given by a “key witness.” See United States v. Whitmore, 359 F.3d 609, 621–23 (D.C. Cir. 2004) (finding harmful, reversible error and vacating a conviction when the district court prohibited the defendant from cross-examining a key witness about three instances of past misconduct). Accordingly, the Court should reject the Government’s analysis or, at the least, hold in abeyance any finding with respect to Rule 608(b) until evidence of Mr. McNamee’s alleged conduct for untruthfulness and the circumstances in which the “specific contradiction rule” will be needed becomes less speculative.

IV. Granting The Government’s Second Motion In Limine Regarding Mr. McNamee Would Be Unfair.

Finally, the Court should also deny the Government’s motion on principle. The Government’s purported basis for its omnibus motion in limine is a selection of divorce filings dated April 9, 2010 and September 1, 2010. The Government had access to and produced copies of these materials on December 3, 2010, over seven months before the deadline to submit pretrial motions set in connection with the first trial. The Government filed a motion in limine regarding only one of the matters it raises now—the 2001 Florida incident and investigation—but the Court decided not to grant that motion after full briefing and oral argument. How is it fair, then, for the Government to start from scratch eight months later in an all-points effort to shield its principal witness from adequate cross-examination? The only changed circumstances are the Government’s ill-begotten preview of the defense strategy with respect to Mr. McNamee and
some long overdue investigation by federal agents into the specifics of prior bad acts of which the Government was already generally aware. Again, how is this fair?

The Government’s bald attempt to take a second bite of the apple is unconstitutional. See, e.g., Tibbs v. Florida, 457 U.S. 31, 41 (1982) (noting that the Double Jeopardy Clause “prevents the State from honing its trial strategies and perfecting its evidence through successive attempts at conviction”); Ashe v. Swenson, 397 U.S. 436, 447 (1970) (the State conceded that, after the defendant was acquitted in one trial, the prosecutor did, at a subsequent trial, “what every good attorney would do—he refined his presentation in light of the turn of events at the first trial”); Hoag v. New Jersey, 356 U.S. 464 (1958) (after an alleged robber was acquitted, the State altered its presentation of proof in a subsequent, related trial—calling only the witness who had testified most favorably in the first trial—and obtained a conviction). Although the Court is not in a position to dismiss this case outright for the reasons set forth in previous opinions, the Court should still serve the interests of fairness by barring the Government from taking advantage of the mistrial it caused by its own conduct.

CONCLUSION

Accordingly, and for each of the reasons set forth above, this Court should deny the Government’s motion in limine or, in the alternative, reserve ruling on the permissible scope of cross examination of Mr. McNamee at this time.

Respectfully submitted,

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Attorneys for Defendant William R. Clemens
"I see. And precisely what methods did you use to determine that my client was a 'bad boy'?"
Defendant Gerald Johnsted is charged with two counts of mailing threatening communications in violation of 18 U.S.C. § 876 and two counts of intentionally conveying false and misleading information in violation of 18 U.S.C. § 1038(a)(1). (Dkt. #16.) Before this court is Johnsted’s challenge to the government’s introduction of testimony by a handwriting expert pursuant to Federal Rules of Evidence 702 and 403; Daubert v. Merrell Dow Pharmaceuticals, Inc., 509 U.S. 579 (1993); and Kumho Tire Co. v. Carmichael, 526 U.S. 137 (1999). (Dkt. #11.) Specifically, Johnsted has moved to exclude the report and expert testimony of United States Postal Service handwriting analyst Gale Bolsover, who would opine that the hand printing on the communications at issue belong to the defendant.¹ After reviewing Bolsover’s proposed opinion testimony for relevance and reliability, as well as hearing evidence from the parties, the court finds that the science or art underlying handwriting analysis falls well short of a reliability threshold when applied to hand printing analysis. Because the government has not demonstrated that Bolsover’s analysis is supported by principles and methodology that are scientifically valid, at least in light of the

¹ In addition to the work of Ms. Bolsover’s, Johnsted moves to exclude the reports and testimony of handwriting expert Debra Campbell. (See Mot. to Exclude (dkt. #11).) The government has advised that it does not intend to introduce Campbell’s reports or to have her testify, so that portion of defendant’s motion has been rendered moot.
particular facts and circumstances of this case, the court will exclude Bolsover’s testimony and report.

RELEVANT FACTS

On or about August 14, 2009, B.D. and his wife received communications by mail containing threats to injure them. Both the communications and the address on the envelope were printed by hand. U.S. Postal Service personnel designated those documents as Q-1-A, Q-1-B and Q-1-C. Additional threatening communications were delivered by mail on or about January 2, 2010, which were designated Q-2-1 and Q-2-2. These communications were also hand printed.

Examiners acquired handwriting exemplars (designated as K-1-1 through K-1-19) from defendant on March 10, 2010. After analyzing the questioned documents and known documents supplemented by Exhibits K-3 through K-5, Gale Bolsover produced a report on February 2, 2012, concluding that “Gerald Johnsted . . . has been identified as the writer of the questioned entries.” (Dkt. #14-4.)

Defendant Johnsted was indicted on November 7, 2012. (Dkt. #1.) On March 4, 2013, the defendant moved to exclude any reports and testimony as to handwriting analysis that the government planned to offer. (Dkt. #11.) This court held a Daubert hearing on July 25, 2013, to aid it in determining whether this evidence was sufficiently reliable and relevant to be admissible under Rule 702. (Dkt. #27.)
OPINION

Federal Rule of Evidence 702 states that an expert may testify in the form of an opinion or otherwise only if:

(a) The expert’s scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue;

(b) The testimony is based on sufficient facts or data;

(c) The testimony is the product of reliable principles and methods; and

(d) The expert has reliably applied the principles and methods to the facts of the case.

Fed. R. Evid. 702.

Pursuant to Rule 702, the United States Supreme Court has charged trial judges with ensuring “that any and all scientific testimony or evidence admitted is not only relevant, but reliable.” Daubert, 509 U.S. at 589. This obligation entails making “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.” Id. at 592-93. In Daubert, the Supreme Court dealt specifically with scientific testimony. In Kumho Tire, the Court held that the trial court’s gatekeeping responsibility applies to “all ‘scientific,’ ‘technical,’ or ‘other specialized’ matters within [Rule 702’s] scope.” Kumho Tire Co., 526 U.S. at 147. The Court also emphasized in Kumho Tire that a trial court’s role is “to determine reliability in light of the particular facts and circumstances of the particular case.” Id. at 158 (emphasis added).

This court must, therefore, determine whether Bolsover’s opinions “rest[] on a reliable foundation” – that is, whether they are based on scientifically valid principles -- and
“[are] relevant to the task at hand.” Daubert, 509 U.S. at 597. The “task at hand” in this case is Bolsover’s analysis comparing unknown hand printing samples to known hand printing samples.

In Daubert, the Supreme Court laid out several factors that a court may consider in assessing the reliability of evidence: (1) whether the technique can be and has been tested; (2) whether it has been subjected to peer review and publication; (3) the known or potential rate of error; (4) the existence and maintenance of standards controlling the technique’s operations; and (5) “general acceptance” within the relevant scientific community. Daubert, 509 U.S. at 593-94. These factors are “meant to be helpful, not definitive.” Kumho Tire Co., 526 U.S. at 151. “[W]hether Daubert’s specific factors are, or are not, reasonable measures of reliability in a particular case is a matter that the law grants the trial judge broad latitude to determine.” Id. at 153. The inquiry’s “overarching subject is the scientific validity – and thus the evidentiary relevance and reliability – of the principles that underlie a proposed submission.” Daubert, 509 U.S. at 594-95. “The focus, of course, must be solely on principles and methodology, not on the conclusions that they generate.” Id. at 595.

In this case, both parties (and the government in particular) cite a large number of cases addressing whether handwriting analysis passes muster under Daubert. Given this court’s obligation to inquire into the evidence’s reliability, the court devotes most of this opinion to analyzing the expert testimony with reference to the Daubert factors, while maintaining an overarching focus on the scientific validity of the principles underlying the methodology of hand printing analysis, to determine their relevance and reliability “in light of the facts and circumstances of this particular case.”
The Supreme Court advises that the first Daubert factor -- whether a theory or technique has been tested -- is “a key question” in the analysis. Daubert, 509 U.S. at 593. Both the government and its expert explain that the art of handwriting analysis is premised on two main principles: “handwriting is unique, meaning that no two people write exactly alike, and no one person writes exactly the same way twice.” (Pl.’s Br. (dkt. #30) 6.) As guiding principles for expert analysis, these would appear more dubious than many, but purportedly they form the foundation for a science able to detect (1) qualities unique to the writing of but one person (the principle of individuality); and (2) the telltale marks of someone attempting to copy or closely mimic that uniqueness (the principle of variation). http://www.fbi.gov/about-us/lab/forensic-science-communications/review/2009_10_review02.htm; see also United States v. Starzecpyzel, 880 F. Supp. 1027, 1031-32 (S.D.N.Y. 1995).

The government cites to a number of studies as demonstrating that handwriting is unique, including some showing that twins’ writings were individualistic and others demonstrating computer software’s ability to measure selected handwriting features. (Pl.’s Br. (dkt. #30) 6-7.) Defendant contends that these studies are problematic, and that even one of the government’s own studies states that “the individuality of writing in handwritten notes and documents has not been established with scientific rigor.” (Def.’s Reply (dkt. #31) 4 (quoting Pl.’s Exh. 12, at 1).) Defendant also points out that Bolsover knows of no studies supporting the second fundamental premise of handwriting analysis -- that no one person writes exactly the same way twice. (Id.)

Even accepting that studies have adequately tested the first principle -- that all handwriting is unique -- the government does not dispute the troubling lack of evidence testing or supporting the second fundamental premise of handwriting analysis. Even more
troubling is an apparent lack of double blind studies demonstrating the ability of certified experts to distinguish between individual's handwriting or identify forgeries to any reliable degree of certainty. This lack of testing has serious repercussions on a practical level: because the entire premise of interpersonal individuality and intrapersonal variations of handwriting remains untested in reliable, double blind studies, the task of distinguishing a minor intrapersonal variation from a significant interpersonal difference -- which is necessary for making an identification or exclusion -- cannot be said to rest on scientifically valid principles. The lack of testing also calls into question the reliability of analysts' highly discretionary decisions as to whether some aspect of a questioned writing constitutes a difference or merely a variation; without any proof indicating that the distinction between the two is valid, those decisions do not appear based on a reliable methodology. With its underlying principles at best half-tested, handwriting analysis itself would appear to rest on a shaky foundation. See Deputy v. Lehman Bros., Inc., 345 F.3d 494, 509 (7th Cir. 2003) (noting that among courts, "there appears to be some divergence of opinion as to the soundness of handwriting analysis").

This is compounded in the present case by the fact that Bolsover purports to have engaged in hand printing, not handwriting, analysis. Given that the written communications at issue in this case are exclusively printing, and limited printing at that, this court is obligated to consider that specific discipline. See Kumho Tire, 526 U.S. at 158. The government argues that distinguishing between hand printing and handwriting is "a distinction without a difference." (Pl.'s Br. (dkt. #30) 23.) As support, it points out that many, if not all, of the standards governing analysis of hand printing are identical to those governing analysis of handwriting. For instance, the government notes that Forensic
Document Examiners ("FDEs") are "trained to treat hand printing and handwriting the same" and that they "look at the same class characteristics and individual characteristics in the writing." (Id. at 24.) The Scientific Working Group for Forensic Document Examination ("SWGDOC") does not distinguish between the two, defining a "handwritten item" as "an item bearing something written by hand (for example, cursive writing, hand printing, signatures)." (Id. at 9.) And the examination standards "make clear there is no difference in the examination protocol" when examining hand printing, rather than handwriting. (Id. at 24.)

These facts may well be true, but it is this very lack of distinction that the court finds problematic. The government's evidence indicates only that current standards of analysis are the same for handwriting and hand printing, not that they should be. The absence of such evidence might be less important if a consensus existed that hand printing and handwriting can reliably be analyzed in the same way, but that is not the case. As defendant points out and Bolsover conceded, "eminent authorities in the field of handwriting comparison state that critical differences exist in the analysis of hand printed and cursive documents." (Def.'s Reply (dkt. #31) 2 (citing Hrg'g Tr. (dkt. #29) 56, 57).) Indeed, most of the studies on handwriting analysis cited by both parties either do not involve hand printing or do not distinguish between the two, despite the apparent differences that exist.

More problematic still, those studies that do involve hand printing have yielded ambiguous results. For example, the 2003 Kam study upon which the government relies indicates FDEs made correct identifications less frequently than laypersons in hand printing analyses (though they also made incorrect identifications less frequently than laypersons).
(Pl.’s Exh. 28, at 3.) Additionally, as defendant points out, Kam’s analysis revealed a higher false identification rate for hand-printed documents than handwritten documents. (See id. (wrong association rate of FDEs was 5.5% for non-hand-printed documents and 9.3% for hand-printed documents).) The 2002 Srihari and the 2009 Durina studies apparently also included hand printing, but it does not appear that they actually differentiated between printing and writing in reporting their results. (See Pl.’s Exhs. 12, 30.) Ultimately, the limited testing that exists is inconclusive as to the reliability of hand printing analysis. Thus, while the government appears to be technically correct that standards exist controlling the technique’s operations (one of the Daubert factors), that fact does not tend to establish reliability without some evidence that those standards are actually appropriate in the hand printing context.

The standards at issue are also extremely discretionary, which likewise tends to undermine the reliability of the techniques used in handwriting analysis. As the government indicates, some flexibility in standards may be required to adapt to the different variables that may arise from case to case, meaning that a “numeric baseline” may not be appropriate (Pl.’s Br. (dkt. #30) 21), but the standards governing handwriting analysis appear almost entirely discretionary. Bolsover indicated that analysts must rely on their individual training and experience to differentiate between an intrapersonal variation and an interpersonal difference in handwriting. (Def.’s Br. (dkt. #31) 5 (citing Hr’g Tr. (dkt. #29) 62, 65).) Though SWGDOC provides guidelines for nine separate conclusions an analyst can draw, Bolsover conceded that analysts must rely entirely on their experiences and individual training to determine when a case warrants a particular conclusion. (Hr’g Tr. (dkt. #29) 98-99.) By itself, a lack of more clearly-defined standards may not warrant
exclusion, but the standards governing handwriting analysis only minimally "control[] the
technique's operation." *Daubert*, 509 U.S. at 594.

Likewise, peer review and publication on the specific practice of hand printing
analysis (another of the *Daubert* factors) is limited. While Bolsover pointed out numerous
peer-reviewed journals that address forensic document examination, she conceded the
discipline of forensic document examination comprises more than just hand printing
analysis. (Hr'g Tr. (dkt. #29) 53-54.) A mere list of journals does not convince the court
that the specific techniques at issue in this case have been peer reviewed, particularly given
the relative dearth of studies addressing hand printing. The government also argues that
every examiner's work is reviewed by another examiner and that additional peer review is
built into the lab accreditation process (Pl.'s Br. (dkt. #30) 11), but the court is not
persuaded that this fact adds to the reliability of the analysis here, since those examiners
and accreditors would presumably apply the same standards of handwriting analysis that
Bolsover applies, none of which have been adequately tested, at least in the hand printing
context.

The known or potential rate of error is also a relevant factor under *Daubert*. The
court agrees with the government that a 0% error rate is unnecessary for purposes of
demonstrating reliability. *See Daubert*, 509 U.S. at 590 ("[I]t would be unreasonable to
conclude that the subject of scientific testimony must be 'known' to a certainty; arguably,
there are no certainties in science."). As already discussed above, however, the testing that
has been performed as regards to hand printing analysis has yielded ambiguous results at
best.
Finally, *Daubert* explains that the court may consider other factors in analyzing whether a given expert’s testimony rests on scientifically valid principles. *See id.* at 593 ("Many factors will bear on the inquiry, and we do not presume to set out a definitive checklist or test."). Here, the court finds the lack of reliable blind testing worth emphasizing. The government seeks to dismiss the need for such testing, stating that “FDEs cannot be swayed by doing a side-by-side comparison of a known and questioned writing, because FDEs start from a neutral position in every comparison they make.” (Pl.’s Br. (dkt. #30) 29.) This misses the point of double blind testing, which is generally meant to avoid the possibility of observer effects and biases. (*See* Nat’l Academy of Sciences, Strengthening Forensic Science in the United States: A Path Forward 8 (2009) (Def.’s Exh. 40) (noting that “[a] body of research is required to establish the limits and measures of performance and to address the impact of sources of variability and potential bias” and that “[s]uch research . . . seems to be lacking in most of the forensic disciplines that rely on subjective assessments of matching characteristics”).) At any rate, this information about testing procedures, though not determinative on its own, is another indicator that the methodology at issue lacks a baseline level of reliability, particularly given the reality that “[t]he findings of forensic science experts are vulnerable to cognitive and contextual bias.” (*Id.* at 8 n.8.)

In addition, the government failed to provide indicia of reliability as regards Bolsover’s testimony in this specific matter. Her report is entirely conclusory, without any discussion of the underlying bases that allowed her to “identif[y]” Gerald Johnsted as the writer of the questioned communications. (*See* Stephen Meyer Aff. Exh. 4 (dkt. #14-4).) When asked about her report at the hearing, Bolsover conceded that it was nothing more than a “naked opinion” and justified it by saying that lab examiners “are not being paid by
the hour.” (Hr’g Tr. (dkt. #29) 49-50.) Even when given the opportunity at the hearing, Bolsover failed to provide any characteristics of uniqueness or variations in the communications at issue to give the court some level of baseline confidence that she had based her testimony on “sufficient facts or data” and that she “reliably applied the principles and methods to the facts of the case.” Fed. R. Evid. 702. The government’s decision to provide nothing more than Bolsover’s single-sentence conclusion, and in particular to provide no explanation of the underlying basis for her conclusion, leaves the court with nothing to hang its hat on in determining whether Bolsover’s methodology and analysis in this case are supported by scientifically-valid principles. Just as troubling, it would also leave defendant and his counsel with nothing on which to base an effective cross-examination (one of the “traditional” means of attacking shaky evidence). See Daubert, 509 U.S. at 596.

The government points out that every circuit court to review a district court’s decision to admit handwriting analysis has affirmed that decision. See Deputy, 345 F.3d at 509 (collecting cases). But that argument is unavailing here. First, although circuit courts have affirmed lower courts’ decisions to permit expert testimony on handwriting analysis, there remains “some divergence of opinion as to the soundness of handwriting analysis,” and “[s]everal district courts . . . have rejected handwriting analysis, finding it lacks scientific reliability.” Id. (collecting cases). As defendant correctly points out, the circuit courts were also reviewing the district courts’ decisions under deferential standards of review; they were not laying down a rule that handwriting analysis must always be admissible under Rule 702. See United States v. Prime, 431 F.3d 1147, 1152 (9th Cir. 2004) (abuse of discretion); United States v. Crisp, 324 F.3d 261, 265 (4th Cir. 2003) (abuse of

The lack of a definitive ruling on admissibility of expert testimony on handwriting is understandable given the Supreme Court’s holding that a Rule 702 inquiry involves “determin[ing] reliability in light of the particular facts and circumstances of the particular case.” Kumho Tire Co., 526 U.S. at 158. Certainly none of the cases discussed above dictates that this court must find expert testimony regarding handwriting analysis admissible, much less must find that hand printing analysis is admissible in the particular facts and circumstances of this case.

The dearth of studies demonstrating the reliability of hand printing analysis may be due to a lack of investigation into the discipline, which does not necessarily mean that such analysis is unreliable by its nature. Even so, the Supreme Court in Daubert directed trial judges to play the role of gatekeeper as far as unreliable evidence is concerned, understanding the risks that attend:

[I]n practice, a gatekeeping role for the judge, no matter how flexible, inevitably on occasion will prevent the jury from learning of authentic insights and innovations. That, nevertheless, is the balance that is struck by Rules of Evidence designed not for the exhaustive search for cosmic understanding but for the particularized resolution of legal disputes.

Daubert, 509 U.S. at 597.
The court is also aware that in general, “[v]igorous cross-examination, presentation of contrary evidence, and careful instruction on the burden of proof are the traditional and appropriate means of attacking shaky but admissible evidence” and that “[t]hese conventional devices . . . are the appropriate safeguards where the basis of scientific testimony meets the standards of Rule 702.” Id. at 596. The proffered expert testimony here, however, does not even qualify as the “shaky but admissible” variety. It is testimony based on two fundamental principles, one of which has not been tested or proven, and neither of which have been proven sufficiently reliable to assist a lay jury beyond its own ability to assess the similarity and differences in the hand printing in this case. Because the government has not provided enough evidence to demonstrate the reliability of handwriting analysis to the hand printing in this case, Bolsover’s expert analysis will be excluded at trial.

ORDER

IT IS ORDERED that the testimony and report of government witness Gale Bolsover are EXCLUDED.

Entered this 8th day of October, 2013.

BY THE COURT:

/s/

WILLIAM M. CONLEY
District Judge
Lawyer Punished for Revelation That Brought Down a Judge

By ADAM LIPTAK

A lawyer who divulged a client’s confidences to bring down a corrupt judge acted improperly, the Washington Supreme Court ruled on Thursday. It suspended the lawyer, Douglas Schafer, for six months.

"Because of Schafer's actions, a corrupt judge was exposed and the public was served by the judge's removal from office," Justice Bobbe J. Bridge wrote for the majority in the 6-to-3 decision. But "in light of the importance of maintaining client confidences and Schafer's willful, unnecessary and repeated violation of his ethical duty not to betray his client's trust, we hold that a six-month suspension is appropriate."

Robert Winsor, a visiting judge writing in partial dissent, questioned the majority's contention that the punishment was necessary to maintain public confidence in the judicial system.

"A more likely public reaction to such a harsh sanction in the post-McCain era," he wrote, "is the opposite — a perception that lawyers can be counted upon not to reveal fraud perpetrated by their clients because any whistle-blowers among them will be severely punished by the courts regardless of the public good that such whistle-blower might accomplish."

Judge Winsor wrote that a 30-day suspension would have been appropriate.

The case arose from a conversation between Mr. Schafer and a client in 1992. The client, William Hamilton, told Mr. Schafer that Grant Anderson, who was about to become a superior court judge in Tacoma, Wash., was going to engage in improper conduct as the trustee of a dead man's estate. Soon afterward, Mr. Hamilton bought a bowling alley owned by the estate at a below-market price. At around the same time, Mr. Hamilton gave Judge Anderson a Cadillac.

In 1999, in response to Mr. Schafer's disclosures, the Washington Supreme Court removed Judge Anderson from the bench for "a pattern of dishonest behavior unbecoming a judge." He was also forbidden to practice law for two years. Mr. Anderson has since resumed his legal practice.

"Experts in legal ethics said Mr. Schafer's suspension was justified," "The public has a lot of trouble understanding that lawyers keep secrets for guilty people, but it's important for the functioning of the legal system," said Steven Lubet, a law professor at Northwestern University.

Mr. Schafer did not inform the authorities of Judge Anderson's misconduct until three years after he learned of it — when the judge sanctioned him for bringing a frivolous suit in 1996.

"The rule in Washington today," he said, "would not allow a lawyer, even with the best of motives, to speak up to save an innocent person on death row based on confidential information from a client."

The Washington ethical rules do not allow disclosures that would stop a client from committing a crime in the future.

"I think six months is too little," Professor Gilliers said of the sanction imposed against Mr. Schafer. "A motive makes a big difference here."

"In an interview, Mr. Schafer said the court had sent the wrong signal to potential whistle-blowers: "They are clearly delivering the message that the secrets of a corrupt client who conspired with a corrupt judge are more important than the restoration of the integrity of the judicial system," Mr. Schafer said. "The message that comes clearly is that the maintenance of the judicial system's integrity is not the highest priority."

Douglas Schafer was barred from practicing law for six months.
Testimony of Priest and Lawyer Frees Man in an '87 Murder

Continued From Page A1

The priest, the Rev. Joseph Towle, and the lawyer, Stanley Cohen — completely sealed the matter: "If Forne's statements to Father Towle and Cohen are included, it is difficult to imagine that any reasonable jury could find Morales guilty beyond a reasonable doubt."

After Mr. Forne died in 1981, the priest and the lawyer independently decided they could reveal what he had told them about the case.

"The judge rejected arguments from a Bronx prosecutor, Allen P. W. Koren, that Mr. Morales not be released, saying that the prosecutor had mistrusted parts of the evidence. He ordered Mr. Morales' immediate release and invited lawyers for Mr. Montalvo to submit papers making a similar request."

Later, speaking by phone, Mr. Morales said that as he was driven to the Bronx by his brother-in-law, Scott Fowler, he looked out at a city transformed since he last saw it in late 1988: "A lot of new scenery, new buildings. The Bronx is totally different. I don't see abandoned buildings. No graffiti on the wall anymore."

"The landscape of his own life had changed as well. His son had grown. His sister, Maria, a nurse, is expecting her first child. Mr. Morales had entered prison shortly after his time serving."
RELIABILITY OF EVIDENCE

Out of Court Statement
(generally admissible)

↓

implicates

↓

Hearsay
civil and criminal cases

↓

Confrontation clause
criminal cases only

1. Prohibited:
   only when used for purpose of proving the truth of the statement; and even then

2. Not prohibited if:

   (a) exempted from definition

   (b) used for a different purpose (e.g. bias, motive, state of mind, impeachment)

   (c) within one or more enumerated exceptions

   availability  unavailability

   testimonial prohibited unless witness is:
   1. Available to be examined or

   2. Unavailable (in good faith) and defendant had prior opportunity to cross-examine

   non-testimonial not prohibited
(Cite as: 25 NO. 3 Litigation 38)

Litigation
Spring, 1999
Evidence

SUMMARY EVIDENCE

Paul J. Fishman [FullName]

Westlaw LawPrac Index

Jud. -- Judicial Management, Process & Selection

It is the fourth day of jury deliberations, and the foreman sends out a note. "We're confused about certain transactions. In summation, the prosecution reviewed the number of loan applications processed by the defendants, the total amount of the loans, the date the loans were issued, and the fees they earned. Can we see the handwritten chart the prosecutor used, or can we have his summation read back?"

(Cite as: 25 NO. 3 Litigation 38, *38)

After some begging by the prosecutor and vigorous objection by the defense, the court sends back a note of its own: "The arguments by counsel are not evidence. We cannot provide the information you seek."

In the courtroom next door, the jury in another case is having no such difficulty. That jury is busy poring over a summary chart that chronologically collates information from wiretapped telephone calls, data from bank, hotel, and airline records, and the results of physical surveillance. Why was one jury's request turned down, while the other was able to see the chart without even asking? The reason is simple: The prosecutor next door took advantage of Federal Rule of Evidence 1006.

Rule 1006 provides:

- The contents of voluminous writings, recordings, or photographs which cannot conveniently be examined in court may be presented in the form of a chart, summary, or calculation. The original, or duplicates, shall be made available for examination or copying, or both, by other parties at a reasonable time and place. The court may order that they be produced in court.

(Cite as: 25 NO. 3 Litigation 38, *38)

The number of courts that hold that summary evidence, whether testimonial or demonstrative, was not evidence at all. As a result, many jurors received instructions that severely limited the use and weight of such evidence. Often, jurors were not allowed to bring the summary charts into the jury room. Other courts admitted summary exhibits into evidence only if all the underlying documentation had been admitted and only if the summary was pristine and unavailable. At the other end of the spectrum, a number of courts concluded that summary charts were admissible and could go to the jury, provided that the underlying documents were available for examination by opposing counsel. Rule 1006 was designed to standardize the treatment accorded summary evidence throughout the country.

The power of summary evidence cannot be overstated. As one court of appeals noted in reviewing the admissibility of a summary offered by the government in a criminal trial:

"A chart submitted by the prosecution is a very persuasive and powerful tool, and must be fairly used since, by its arrangement and use, it is an argument to the jury during the course of the trial."

United States v. Conlin, 551 F.2d 534, 538-39 (2d Cir.), cert. denied, 434 U.S. 831 (1977). Used properly, summary evidence is the trial lawyer's opportunity to present an argument to the jury about which the judge should not (and, under Rule 1006, probably will not) caution that it is only an argument.

(Cite as: 25 NO. 3 Litigation 38, *38)

But that is just one reason to use a summary. There are more.

First, a summary in the form of a chart or diagram gives you the opportunity to make your case visually. Whether or not a picture is worth a thousand words, a chart may be worth more than a closing argument—particularly if the jury gets to look at it in the jury room. It is one thing to say that an insurance company rejected 75 percent of its claims. Giving the jury a pie chart is better. Summary evidence also allows you to repeat evidence without being obvious about it. Imagine the impact of seven FBI agents testifying about surveillance of the defendant going to the bank 45 times, followed by the testimony of another FBI agent who uses a time line to show how each of the defendant's visits to the bank coincided with telephone calls he made to his alleged drug customers. Finally, Rule 1006 gives you the chance to do something ordinarily not within your power—create evidence. You *39

(Cite as: 25 NO. 3 Litigation 38, *39)

may not be able to spin straw into gold, but Rule 1006 lets you pile it into a neat and tidy haystack. A summary chart can be as simple as a list of checks with a table showing the date each check was written, the check number, the amount, the payee, and the exhibit number. Another summary chart might group and total all the checks by individual payee. Or a chart could organize all of an individual's expenses.

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from his checking account, much as computer software such as Quicken or Microsoft Money might do for tax purposes. Charts like these have a powerful visual and repetitive impact that aids the jury's retention and eliminates confusion.

So what are the rules? Couched in the form of objections and rulings, here are the highlights:

Objection: I'd like to voir dire the witness on the creation of the chart.

Ruling: It depends on the content or design of the chart.

If you have laid the necessary foundation, the calculations on which the chart is based and the review that the witness conducted are appropriately the
subject of ordinary cross-examination, not voir dire. And if the chart is simple, clear, and fair on its face, that is how most courts will rule. See United States v. Collins, 596 F.2d 166, 169 (6th Cir. 1979). On the other hand, at least one court of appeals has relied in part on the availability of voir dire as a reason to sustain the admission of summary charts. United States v. Massey, 89 F.3d 1435, 1441 (11th Cir. 1996), cert. denied, 519 U.S. 1127 (1997). If you absolutely must keep the chart out, if you want to disrupt your adversary’s rhythm, or if you can simply point to different records that might have resulted in a different chart, voir dire may be worth pursuing. But if you are the proponent of the exhibit or testimony, you may be able to avoid that (Cite as: 25 NO. 3 Litigation 38, *39)

unnecessary interruption by discussing your summary with the court and counsel beforehand.

Objection: The witness did not prepare the chart.

Ruling: Overruled.

Often, you will come up with the idea for a chart or summary and, depending on the resources available to you, prepare it yourself or tell someone else how to do it. Creating the summary is usually a task that can be delegated in segments. A paralegal can total the checks or count the phone calls, and an outside company can collate the data in a powerful demonstrative exhibit that you or they design. Although some courts have suggested that the exhibit should be "prepared by a witness available for cross-examination, not by the lawyers trying the case," see, e.g., United States v. Gonzalez-Montoya, 117 F.3d 356, 361 (8th Cir.), cert. denied, 523 U.S. 1007 (1997), that expectation is not always practical or realistic. And it ignores the increasing role of computers in reviewing evidence and creating summaries.

The key: It doesn’t really matter who actually prepares the exhibit, or even who initially performs the calculations or compiles the data, as long as the witness through whom the exhibit is introduced can personally attest to its accuracy and explain where the information came from. Of course, you should introduce the exhibit through a witness whose expertise is such that it will lend extra credibility and weight to the exhibit’s content. In other words, you (Cite as: 25 NO. 3 Litigation 38, *39)

can create the evidence yourself as long as your witness can explain that he or she is fully familiar with all the facts and evidence that underlie it and that it is accurate.

Objection: The underlying documents have not been admitted into evidence.

Ruling: Overruled.

There is no requirement that the material underlying the summary actually be admitted into evidence, see United States v. Strissel, 920 F.2d 1162, 1163 (4th Cir. 1990), although the Rule does require the underlying material to be admissible. See United States v. Meyers, 847 F.2d 1408, 1412 (9th Cir. 1988); FTC v. Piggle-Wiggle, Inc., 994 F.2d 395, 608 (9th Cir. 1993), cert. denied, 510 U.S. 1110 (1994). So what difference does it make? Not much, as long as you are confident that you have a basis to admit the underlying records. The hearsay rule poses frequent problems, so make sure that the documents are admissible under one or more of the exceptions. See Evergreen Pipeline Constr. Co. v. Merrifield Meridian Constr. Co., 95 F.3d 153, 163 (2d Cir. 1996); United States v. Peliello, 904 F.2d 193, 204 (3d Cir. 1990).

The whole point of summary evidence is to avoid having to shuffle all the defendant’s invoices to the courtroom or having to play all 20 hours of a witness’s deposition testimony for the court. Rule 1006 is about making things easier and clearer. It is not a device to avoid other requirements of the rules of evidence. (Cite as: 25 NO. 3 Litigation 38, *39)

Unfortunately, the courts routinely get this requirement wrong, frequently affirming the admissibility of summary charts only because the underlying evidence was admitted. See Air Safety, Inc. v. Roman Catholic Archbishop, 794 F.3d 1, 7 n.14 (1st Cir. 1966); United States v. Kolmer, 675 F.2d 662, 605-06 (4th Cir.), cert. denied, 429 U.S. 832 (1982); *40 (Cite as: 25 NO. 3 Litigation 38, *40)

Gordon v. United States, 438 F.2d 858, 876 (5th Cir.), cert. denied, 904 U.S. 828 (1911); United States v. Dorca, 783 F.2d 1170, 1182-83 (4th Cir. 1986). Fortunately, a number of courts have rejected that analysis, recognizing that the rule means what it says (i.e., the "originals...shall be made available") and that admission of the underlying material into evidence is not required. United States v. Strissel, 920 F.2d at 1164; Hackett v. Housing Authority of San Antonio, 750 F.2d 1308, 1312 (5th Cir.), cert. denied, 474 U.S. 850 (1985).

Objection: All the records examined by the witness are not here in the courtroom.

Ruling: Overruled.

The presence of the underlying records is not required; they must merely be available. See United States v. Clements, 588 F.2d 1030 (5th Cir.), cert. denied, 440 U.S. 982, 441 U.S. 936 (1979). Indeed, Rule 1006 expressly states that the "court may order that they be produced in court." Of course, by the time you are making that objection, it is usually going to be too late to examine the data—even if it is in court. So as soon as you learn that your (Cite as: 25 NO. 3 Litigation 38, *40)

adversary plans to introduce a summary, get access to the underlying records. And remember that if you are offering a summary and you have not given your adversary the opportunity to examine the underlying material, you probably will not get your summary into evidence. As one court has noted, "[t]he purpose of the availability requirement is to give the opposing party an opportunity to verify the reliability and accuracy of the summary prior to trial." Amare v. Connell, 103 F.3d 1404, 1516 (6th Cir. 1996) (citation omitted); accord Bath Iron Works Corp. v. United States, 34 Fed. Cl. 218, 277 (Cl. 1995), and mem., 58 F.3d 1357 (Fed. Cir. 1995).

Objection: The number of records here is not so large that it would be impossible for the jury to examine them.

Ruling: Overruled.

There is no requirement that it be "impossible" for the jury to review the underlying evidence. While some of the case law mistakenly refers to such a standard, the touchstone of the analysis is the rule's requirement that the documents be so "voluminous" that they "cannot conveniently be examined in court." See United States v. Scales, 594 F.2d 458, 562 (6th Cir.), cert. denied, 441 U.S. 946 (1979); United States v. Stephens, 779 F.2d 232, 238-39 (5th Cir. 1985).

Sometimes, it will be easy to meet this requirement and get the court to admit the summary. For example, in Nichols v. Upjohn Co., 610 F.2d 293 (5th (Cite as: 25 NO. 3 Litigation 38, *40)

Cir. 1980) (per curiam), the court admitted a summary of a 300-volume, 94,000- page new drug application that the defendant had submitted to the FDA. Likewise, in United States v. Tannich, 49 F.3d 1049 (5th Cir.), cert. denied, 516 U.S. 859 (1994), the court had no trouble characterizing as "more than inconvenient" the possibility of an in-court examination of "28,000 documents (25 lateral 5-shell file cabinets), which would fill about two-thirds of the courtroom." Id. at 1056 & n.9. Similarly, courts often will admit a "composite" tape, which is actually a "greatest hits" version of tape recordings that are simply too long to play beginning to end. The summary excerpts must truly be illustrative of the entire tape, but a fair set of excerpts is a valuable tool when the alternative is
to play hours of conversations that may put the jury to sleep.
In other situations, whether the convenience test has been satisfied may be less clear. See United States v. Pospisil, 849 F.2d 332 (8th Cir. 1988) (admitting a chart, prepared by a DEA agent, showing 250 calls from the defendant to his drug-dealing subordinates). Although the Rule expressly
refers to the volume of the underlying material, that is not the only factor. A number of courts have explicitly or implicitly analyzed the complexity of the case or the underlying documents as well.
In United States v. Campbell, for example, the court affirmed the admission of a chart summarizing 36 medical files, noting that some of the technical

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material may not have been easily comprehensible by laymen. 845 F.2d 1274, 1381 (6th Cir.), cert. denied, 488 U.S. 908 (1988). Other courts have used similar language, admitting summaries because the underlying evidence was confusing and the charts contributed to the clarity of presentation. United States v. Meyers, 847 F.2d 1408, 1412 (9th Cir. 1988); see also United States v. Lemire, 720 F.2d 1327, 1350 (D.C. Cir. 1983) (admitting summary because culling through records might result in confusion), cert. denied, 467 U.S. 1226 (1984).
Remember that the whole point of this exercise is convenience and efficiency for the court and jury. When in doubt, make that the crux of your argument for or against admissibility.

Objection: The chart is not the "best evidence." The underlying records themselves are the real or best evidence.
Ruling: Overruled.
This objection misses the whole point. Rule 1006 is essentially an exception to the best evidence rule. See Martin v. Funtine, Inc., 965 F.2d 110, 115 (6th Cir. 1992). Its purpose is to provide a practical way to summarize a lot of information for the trier-of-fact in the form of admissible secondary evidence.

Object: The jury should do the calculations itself.
Ruling: Overruled.

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One of the purposes of Rule 1006 is to give jurors a break. Jury service is difficult enough without forcing jurors to rummage through evidence to find out what it means. And even though competent counsel will put it all together in summation, it is far better for your client if the jury is not forced to reconstruct the analysis from scratch in the jury room. In United States v. Clements, for example, the court permitted a federal agent to summarize the total value of a gambling operation by doing arithmetic calculations based on wiretapped tape recordings of people placing bets. 888 F.2d 1030 at 1039 ("[A] quintessential summary [is] used to facilitate the jury's deliberations and to avoid forcing the jury to examine boxes of documents in order to make simple calculations.") Fagjola v. National Gypsum Co., 906 F.2d 53, 57 (2nd Cir. 1990).

In United States v. Winn, where the court admitted charts that collated evidence chronologically, the court found it "questionable whether even an above-average panel of jurors, without some framework in the form of a chart or otherwise, could organize the veritable cache of circumstantial evidence...in order to glean the significance from the multifarious facts." 546 F.2d 145, 151 n.17 (5th Cir. 1977), cert. denied, 423 U.S. 756 (1972).
Put in plain English, this stuff is confusing. So make it simple—make a chart.

Object: The chart has nothing to do with the case.
Ruling: Overruled.

Object: The chart really has something on it, but it is being used to "prove a negative." Or perhaps a summary witness testifies that something that should have happened did not. Consider, for example, the ATP special agent who testifies that the weapon found under the defendant's pillow is not registered to him (and perhaps not to anyone else). In effect, the agent has testified to a review of all of the records of the ATP, and he has

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summarized that the records do not reflect a particular entry. Similar testimony is often elicited from an IRS agent who will testify that the defendant never filed a tax return. While the weight of such testimony can be, and often is, attacked on the ground that the database may be inaccurate, there is no question that the absence of evidence is an appropriate subject of summary testimony.

Analogous testimony can properly be elicited in a host of situations. In any circumstance in which a person's activities—or even the activities of an organization—should result in some record having been created, it is sound trial strategy to have someone with access to all those records comb them for the relevant entry. If it cannot be found, a summary witness may so testify.

Object: The summary chart does not adequately reflect all the underlying data.
Ruling: Overruled.

Summary evidence does not have to comprehend every possible fact or

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transaction. Rather, summaries such as charts may include a statistical sample. In United States v. Bentley, 825 F.2d 1104 (7th Cir.), cert. denied, 484 U.S. 501 (1987), the defendant was charged with defrauding customers by fleecing futures contracts. To prove its case, the United States introduced charts illustrating the defendant's holdings on one day every three weeks for more than a year. The defendant objected that the charts neglected to show his position on all other days, but the court held that the sample was sufficiently representative. The fact that the defendant could

Object: The chart or summary can be selective, but it must still be fair and not overly argumentative. The less accurate the summary, and the more loaded the

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descriptive terminology that it includes, the more you risk having it kept out. Remember, it is the proponent's burden to prove the summary's
to include the description of all the underlying
accuracy. Vassey v. Martin Marietta Corp., 29 F.3d 1460, 1468 (10th Cir. 1994). And convincing the court to admit an inaccurate summary will not be a victory if your opponent devastates your credibility and that of your client or witness by exposing the flaw.

Composite Tapes and Summaries
So-called composite tapes pose an analogous problem. Frequently, when there

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are voluminous tape records in a case (such as a criminal case involving extensive wiretapping), the courts will admit a summary tape of the most relevant portions of the underlying records. See, e.g., United States v. Soponis, 17 F.3d 847, 854 (6th Cir. 1994). But be careful. If you include only the greatest hits—that is, the most inculpatory sections—and leave out crucial exculpatory matters, you run the risk of the tapes not making it into evidence.

Object: The witness is summarizing evidence from multiple sources.
Ruling: Overruled.
Not only is there no requirement that summaries be derived from one source, but summaries of different strands of evidence, introduced through various witnesses and from multiple sources, are often the most compelling evidence in a trial and the best use of a summary exhibit or witness.
In United States v. Shirley, 884 F.2d 1130 (9th Cir. 1989), the government introduced telephone records showing calls to and from certain telephone numbers and among various co-conspirators, jail records showing who visited certain inmates and when, records of car rentals, and testimony of witnesses about certain narcotics transactions. The government was then permitted to call a DEA agent who testified that she had compiled a chart collating information from each of these sources and explained how the chart cemented the relationship among the defendants.

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Similarly, in United States v. Williams, 952 F.2d 1504 (6th Cir. 1991), the prosecution introduced charts summarizing key events that occurred on three different days. Compiling and organizing information obtained from telephone records, limousine records, surveillance by federal agents, and tape-recorded conversations, the charts constituted a chronology of key events occurring on three particular days during the alleged conspiracy. The district court admitted the charts, and the court of appeals affirmed. Id. at 1519.

Be careful, though. At least one court has recently held that Rule 1006 does not permit summaries of testimony already offered. United States v. Baker, 10 F.3d 1374, 1411-12 (9th Cir. 1993), cert. denied, 513 U.S. 934 (1994).

**Object:** These summaries are not evidence, and I request that the court so instruct the jury.

**Ruling:** Overruled -- at least in part.

If the necessary foundation has been established under the

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Rule, it is inappropriate for the judge to instruct the jury that the summary is not evidence. Indeed, the Federal Judicial Center's Pattern Jury Instructions now recommend that courts give no instruction on summary evidence "because it is now clear that under Rule 1006, the summary itself is evidence." And the Ninth Circuit recently criticized a district court for giving such a limiting instruction. See United States v. Baker, 10 F.3d at

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1411.

At least one court has noted that such an instruction may unfairly prejudice the proponent of the evidence because the instruction is designed to reduce the weight the jury might otherwise give the summary. See United States v. Osum, 943 F.2d 1394 (5th Cir. 1991). That result is particularly harsh and improper when the underlying documents, consistent with the Rule, are not in evidence and are not themselves available for the jury's inspection. See Osum, 943 F.2d at 1465 n.9. Because the Rule provides that the underlying documents need not be admitted, the summary may often be the only evidence of the facts at issue.

Nevertheless, because the likelihood of reversal for such an incorrect instruction is virtually nil and because many lawyers and judges misapprehend the rule, the case law is replete with examples of courts having given the instruction anyway. See United States v. Tannehill, 49 F.3d 1049, 1055 (5th Cir.), cert. denied, 516 U.S. 859 (1995); United States v. Osum, 943 F.2d at 1405 & n.9; United States v. Possick, 849 F.2d at 339; United States v. Shirley, 884 F.2d 1130, 1133-34 (9th Cir. 1989); United States v. Slatey, 615 F.2d 1117, 1121 & n.5 (5th Cir.), cert. denied, 449 U.S. 832 (1980); United States v. Evans, 572 F.2d 455, 492 (5th Cir.), cert. denied, 439 U.S. 870 (1978).

**Object:** The chart does not satisfy the requirements of Rule 1006.

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**Ruling:** It depends on how the proponent wants to use the chart.

**Charts:** That do not satisfy the requirements of Rule 1006 cannot be admitted into evidence. But if appropriate, they may still be used as demonstratives or postscriptal aid, either during testimony or during opening or closing statements. Under those circumstances, the court should give a limiting instruction. Absent the consent of all parties, the charts cannot go to the jury room. Seidler v. Ben L. Keith Co., 279 U.S. 15 (1928); United States v. Valentine, 532 F.2d 1219, 1224 (9th Cir. 1976); United States v. Goodwin, 777 F.2d 322, 328 (5th Cir. 1985).

**Object:** The charts should not go to the jury.

**Ruling:** If you have met the requirements of Rule 1006, overruled.

We end where we began. Because summary charts are evidence, Rule 1006 permits the jury to have and to hold them. United States v. Possick, 849 F.2d at 339. The impact of those charts may well make the difference between winning and losing. In fact, having your chart in the jury room is almost as good as continuing your summation during deliberations. And it may lead to the same result.

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Speech as Evidence, and Rap Videos


November 19, 2012

Generally speaking, a defendant’s speech — even if constitutionally protected — may be introduced as evidence of his legally significant intentions or knowledge, or as evidence that he was indeed the guilty party. Thus, the statement “I hate Joe Schmoe” is constitutionally protected, but if I’m on trial for killing Joe Schmoe and the prosecution wants to show that I’m the one who did it, the statement would be admissible as evidence of motives.

The same is true for political statements. Thus, for instance, statements of Nazi sympathy were constitutionally protected even during World War II. But if a defendant is on trial for treason for harboring his son (a Nazi saboteur), and the legal question is whether the defendant helped the son with the specific purpose of helping the Nazis (as opposed to just a father’s desire to help his son), the defendant’s speech is admissible evidence of that purpose.

Nonetheless, at times courts refuse to allow such speech as evidence, especially when the speech is seen as having relatively little probative value. The reason isn’t the First Amendment as such, but rather the rules of evidence, such as the rule that evidence can be excluded if its probative value is sufficiently outweighed by its tendency to create unfair prejudice against the defendant. Still, First Amendment concerns likely play something of a role in this balance.

In any event, today’s Massachusetts high court decision in Commonwealth v. Gray (Mass. Nov. 15, 2012) [UPDATE: link fixed] illustrates this issue in the context of a gangsta rap video introduced to show that the defendant — who played a small role in the video — was indeed a gangsta; note the paragraph marked "[*]" by me, which is particularly vivid:

The defendant challenges the introduction of the rap video as evidence of his gang membership. In the circumstances of an apparently random shooting on a public sidewalk, evidence of the feud between H-Block and Heath Street, and of the defendant’s membership in Heath Street, was relevant to provide a reason for an otherwise inexplicable killing. “We repeatedly have held that evidence of gang affiliation is admissible to show motive or joint venture....” See Commonwealth v. Smith, 450 Mass. 395, 399, cert. denied, 555 U.S. 893 (2008) (evidence of defendant’s gang membership and turf war over use of park for drug sales properly admitted to show motive for shooting where police officer testified to defendant’s gang membership and ongoing territorial dispute based on personal knowledge, and even where evidence also included improper opinion evidence, it was harmless error because cumulative of gang membership evidence offered by multiple other witnesses); Commonwealth v. Garcia, 443 Mass. 824, 834 (2005) (evidence victim “flashed” gang colors admissible to explain defendant’s state of mind). Nevertheless, relevance is only the threshold inquiry, and the proffered evidence must also be more probative than prejudicial. The rap video was not.

As stated, after viewing the video that the prosecutor sought to introduce as evidence of the defendant’s membership in Heath Street and his “pledging allegiance” to the Heath Street gang, the judge ruled that its admission would be “more prejudicial than probative” and ordered it excluded unless the defendant challenged evidence of his gang membership. The judge allowed the video to be played for the jury, over vehement objection and offers by the defendant to stipulate to gang membership, following cross-examination of Duggan about the defendant’s photograph in the gang
database....

The rap video should not have been admitted. It was minimally if at all probative, and highly prejudicial. "[E]vidence that poses a risk of unfair prejudice need not always be admitted simply because a defendant has opened the door to its admission; the judge still needs to weigh the probative value of the evidence and the risk of unfair prejudice, and determine whether the balance favors admission."

By the time the rap video was introduced, the defendant had not otherwise contested that he was a gang member; indeed, he had offered to stipulate to that effect. Sheehan had testified as an expert as to the defendant's gang membership, and the Boston police gang database, containing the defendant's photograph, had also been admitted in evidence.... The defendant had refrained from cross-examining Sheehan precisely to avoid having the jury view the rap video.

The video was produced at an unknown point in or before 2005, and was available on a commercial Web site promoting rap artists. The defendant did not write or perform the lyrics or produce the video, and it was not found in his possession. The lyrics show no connection to the defendant that would suggest they were biographical or otherwise indicative of his own motive or intent at the time of the shooting. Contrast, e.g., Jones v. State, 347 Ark. 409, 417-421 (2002). Yet, the video was admitted specifically as an asserted statement of gang allegiance by the defendant, based on Sheehan's voir dire testimony as to its meaning.

[*] Even if the video had contained direct statements of the defendant's gang allegiance, we are not persuaded by the opinions of courts in other jurisdictions that view rap music lyrics "not as art but as ordinary speech" and have allowed their admission in evidence as literal statements of fact or intent "without contextual information vital to a complete understanding of the evidence." In contrast to such treatment of rap music, "[c]ourts do not treat lyricists of other mainstream musical genres similarly, even those who live an outlaw lifestyle or promote an outlaw image ... are not presumed to be making statements about their beliefs, intent or their conduct.... [W]ith respect to country music, we do not likely believe that Johnny Cash shot a man simply to watch him die. With respect to reggae, we do not generally take to heart Bob Marley's proclamation: 'I shot the sheriff, but I did not shoot the deputy...." [Dennis, Poetic (In)Justice? Rap Music Lyrics as Art, Life, and Criminal Evidence, 31 Colum. J.L. & Arts 1, 15 (2007).] We discern no reason why rap music lyrics, unlike any other musical form, should be singled out and viewed sui generis as literal statements of fact or intent.

Although Sheehan asserted during the voir dire that the video "consists of discussing being a Heath Street gang member and what takes place or what's done or conducted by individuals who are Heath Street gang members," there was no evidence that Sheehan was an expert on music video recordings or rap music. A police officer who has been qualified as a "gang expert" cannot, without more, be deemed an expert qualified to interpret the meaning of rap music lyrics.... There was no basis on which either [of the witnesses who discussed the video] properly could offer an expert opinion on the meaning of the video as a pledge of gang allegiance, the reason for which it was ostensibly admitted. The jury heard no other expert testimony as to the video's meaning. Compounding the error, in closing argument the prosecutor relied heavily on Sheehan's voir dire explanation of the meaning of the video as the defendant's "pledging his allegiance" to Heath Street, statements for which the jury heard no basis.
Balanced against the minimal probative value of the video, its prejudicial effect was overwhelming. Although the defendant is neither of the two featured rappers, lyrics such as "forty-four by my side," accompanied by images of stereotypical "gangsta thugs," some of whose faces are covered by bandanas, could not but have had a prejudicial impact on the jury. The impact of the video was evident even on the trial judge, who stated that he relied on it in reaching a conclusion concerning the defendant's gang membership. Even if defense counsel's question about the defendant's photograph in the gang database is viewed as having challenged his status as a Heath Street gang member, other corrective measures, such as the defendant's offered stipulation, would have been sufficient to rebut any perceived challenge. We agree with the initial determination of the judge: the prejudicial effect of the rap video far outweighed its probative value. Admission of the rap video was, in the circumstances, prejudicial error.
The dangers of fast thinking

Our intuition is often wrong, says Daniel Kahneman, especially when we’re searching for patterns and causes.

Consider this: A study of the incidence of kidney cancer in the 3,141 counties of the United States reveals a remarkable pattern. The counties in which the incidence of kidney cancer is lowest are mostly rural, sparsely populated, and located in traditionally Republican states in the Midwest, the South, and the West. Now, what do you make of this information?

Your mind has been very active in the last few seconds, and it was mainly operating in what I call System 2—the “slow” mode of thinking, involved in effortful activities such as doing taxes, comparing two washing machines for best value, or driving in traffic. You deliberately searched memory and formulated hypotheses. Some effort was involved; your pupils dilated, and your heart rate increased measurably. But System 1—the “fast” mode, which includes reacting to loud sounds, understanding simple sentences, and driving on empty roads—was not idle: You probably rejected the idea that Republican politics provide protection against kidney cancer. Very likely, you ended up focusing on the fact that the counties with low incidence of cancer are mostly rural. The statisticians Howard Wainer and Harris Zwerling, from whom I learned this example, commented, “It is both easy and tempting to infer that their low cancer rates are directly due to the clean living of the rural lifestyle—no air pollution, no water pollution, access to fresh food without additives.”

This makes perfect sense.

Now consider the counties in which the incidence of kidney cancer is highest. These ailing counties tend to be mostly rural, sparsely populated, and located in traditionally Republican states in the Midwest, the South, and the West. Wainer and Zwerling comment, “It is easy to infer that their high cancer rates might be directly due to the poverty of the rural lifestyle—no access to good medical care, a high-fat diet, and too much alcohol, too much tobacco.”

Something is wrong, of course. The rural lifestyle cannot explain both a very high and a very low incidence of kidney cancer. The key factor is not that the counties were rural or predominantly Republican. It is that rural counties have small populations. And the main lesson to be learned is not about epidemiology, it is about the difficult relationship between our mind and statistics. System 1 is highly adept in one form of thinking—it automatically and effortlessly identifies causal connections between events, sometimes even when the connection is spurious. When told about the high-incidence counties, you immediately assumed that these counties are different from other counties for a reason, that there must be a cause that explains this difference. As we shall see, however, System 1 is inept when faced with “merely statistical” facts, which change the probability of outcomes but do not cause them to happen.

The predictability of randomness

A random event, by definition, does not lend itself to explanation, but collections of random events do behave in a highly regular fashion. Imagine a large urn filled with marbles. Half the marbles are red, half are white. Next, imagine a very patient person (or a robot) who blindly draws four marbles from the urn, records the number of red balls in the sample, throws the balls back into the urn, and then does it all again, many times. If you summarize the results, you will find that the outcome “two red, two white” occurs (almost exactly) six times as often as the outcome “four red” or “four white.” This relationship is a mathematical fact. A related statistical fact is relevant to the cancer example. From the same urn, two very patient marble counters take turns. Jack draws four marbles on each trial, Jill draws seven. They both record each time they observe a homogeneous sample—all white or all red. If they go on long enough, Jack will observe such extreme outcomes more often than Jill—by a factor of eight (the expected percentages are 12.5 percent and 1.56 percent). No causation, but a mathematical fact: Samples of four marbles yield extreme results more often than samples of seven marbles do.

Now imagine the population of the United States as marbles in a giant urn. Some marbles are marked KC, for kidney cancer.
You draw samples of marbles and populate each county in turn. Rural samples are smaller than other samples. Just as in the game of Jack and Jill, extreme outcomes (very high and/or very low cancer rates) are most likely to be found in sparsely populated counties. This is all there is to the story.

Our predilection for causal thinking exposes us to serious mistakes in evaluating the randomness of truly random events. For an example, take the sex of six babies born in sequence at a hospital. The sequence of boys and girls is obviously random; the events are independent of each other, and the number of boys and girls who were born in the hospital in the last few hours has no effect whatsoever on the sex of the next baby. Now consider three possible sequences:

BBBGGG
GGGGGG
BGBGBG

Are the sequences equally likely? The intuitive answer—"of course not!"—is false. Because the events are independent and because the outcomes B and G are (approximately) equally likely, then any possible sequence of six births is as likely as any other. Even now that you know this conclusion is true, it remains counterintuitive, because only the third sequence appears random. As expected, BGBGGB is judged much more likely than the other two sequences. We are pattern seekers, believers in a coherent world, in which regularities (such as a sequence of six girls) appear not by accident but as a result of mechanical causality or of someone's intention. We do not expect to see regularity produced by a random process, and when we detect what appears to be a rule, we quickly reject the idea that the process is truly random. Random processes produce many sequences that convince people that the process is not random after all. You can see why assuming causality could have had evolutionary advantages. It is part of the general vigilance that we have inherited from ancestors. We are automatically on the lookout for the possibility that the environment has changed. Lions may appear on the plain at random times, and it would be safer to notice and respond to an apparent increase in the rate of appearance of prides of lions, even if it is actually due to the fluctuations of a random process.

The myth of the hot hand

Aleksey Tversky and his students Tom Gilovich and Robert Vallone once caused a stir with their study of
double-team. Analysis of thousands of sequences of shots led to a disappointing conclusion: There is no such thing as a hot hand in professional basketball, either in shooting from the field or scoring from the foul line. Of course, some players are more accurate than others, but the sequence of successes and missed shots satisfies all tests of randomness. The hot hand is entirely in the eye of the beholder, who are consistently too quick to perceive order and causality in randomness. The hot hand is a massive and widespread cognitive illusion.

The public reaction to this research is part of the story. The finding was picked up by the press because of its surprising conclusion, and the general response was disbelief. When the celebrated coach of the Boston Celtics, Red Auerbach, heard of Gilovich and his study, he responded, "Who is this guy? So he makes a study. I couldn't care less." The tendency to see patterns in randomness is overwhelming—certainly more impressive than a guy making a study.

The secret of successful schools

I began with the example of cancer incidence across the United States. The example appears in a book intended for statistics teachers, but I learned about it from an amusing article by the two statisticians I quoted earlier, Wainer and Zwerling. Their essay focused on a large investment, some $1.7 billion, which the Gates Foundation made to follow up intriguing findings on the characteristics of the most successful schools. Many researchers have sought the secret of successful education by identifying the most successful schools in the hope of discovering what distinguishes them from others. One of the conclusions of this research is that the most successful schools, on average, are small. In a survey of 1,662 schools in Pennsylvania, for instance, six of the top 50 were small, which is an overrepresentation by a factor of four. These data encouraged the Gates Foundation to make its investment in the creation of small schools, sometimes by splitting large schools into smaller units.

This probably makes intuitive sense to you. It is easy to construct a causal story that explains how small schools are able to provide superior education and thus produce high-achieving scholars by giving them more personal attention and encouragement than they could get in larger schools.

Unfortunately, the causal analysis is pointless because the facts are wrong. If the statisticians who reported to the Gates Foundation had asked about the characteristics of the worst schools, they would have found that bad schools also tend to be smaller than average. The truth is that small schools are not better on average; they are simply more variable. If anything, say Wainer and Zwerling, large schools tend to produce better results, especially in higher grades, where a variety of curricular options is valuable.

The law of small numbers is part of a larger story about the workings of the mind: Statistics produce many observations that appear to beg for causal explanations but do not lend themselves to such explanations. Many facts of the world are due to chance, including accidents of sampling. And causal explanations of chance events are inevitably wrong.

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UNCHARGED MISCONDUCT EVIDENCE

By Paul A. Ksicinski, Asst. State Public Defender*

Introduction

Section 904.04(2) and Federal Rule of Evidence 404(b) limit the use of uncharged misconduct evidence except for such legitimate purposes as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident. Evidence of uncharged misconduct is inadmissible to establish the defendant’s general character, disposition, or criminal propensity. Fosdick v. State, 89 Wis. 482 (1985); Boldt v. State, 72 Wis. 7, 15-16 (1988); Imwinkelried, “Limiting Instructions on Uncharged Misconduct Evidence: the Last Line of Defense Against Jury Misuse of the Evidence,” 10 Champion 6, 7 (March 1986).

The Wisconsin Supreme Court has cautioned against the unnecessary use of this evidence because of its potential for diverting attention from the real facts of the case and violating the defendant’s right to a fair trial. State v. Spragin, 77 Wis. 2d 89, 103, 252 N.W.2d 94 (1977); Paulson v. State, 118 Wis. 2d 89, 99, 94 N.W. 771 (1903). Despite the inclination of some trial courts, there is no presumption that misconduct evidence is admissible. State v. Spear, 176 Wis. 2d 1101, 1114-15, 501 N.W.2d 429 (1993).

Before misconduct evidence can be admitted in Wisconsin, a trial court must conduct a mandatory test for admissibility. State v. Pharr, 115 Wis. 2d 334, 343-44, 340 N.W.2d 498 (1983). This requires the court to first examine the relevancy of the evidence. State v. Haskett, 129 Wis. 2d 187, 202, 385 N.W.2d 125 (1986); State v. Fesnick, 127 Wis. 2d 247, 254, 378 N.W.2d 272 (1985); State v. Alsteen, 108 Wis. 2d 723, 729, 324 N.W.2d 426 (1982). Next, the court must decide if the evidence is being introduced for a purpose other than to demonstrate character. Finally, a court determines if the probative value of the evidence substantially outweighs any unfair prejudice. Alsteen, supra. The final balancing of probative value and prejudice is not necessary when the evidence is proffered by the defense. State v. Johnson, 184 Wis. 2d 324, 348-

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is admissible if relevant, if not offered to prove propensity, and if its probative value outweighs its potentially prejudicial effect.

Not surprisingly, alleged errors in the admission of uncharged misconduct evidence are the most frequent ground for appeal in criminal cases. 22 C. Wright and K. Graham, Federal Practice and Procedure: Evidence, Section 5239 (1978).

The Wisconsin "Inclusionary" Approach

There are two competing approaches to admitting uncharged misconduct evidence. The exclusionary approach prohibits introduction of any evidence not specifically enumerated in the rule. At one time, the exclusionary approach was utilized in most of the states and a majority of the federal circuits. The inclusionary approach permits introduction of the evidence on any theory other than that prohibited by the general rule. Under this approach, exceptions such as plan, motive, and opportunity are merely illustrative but not exclusive. Wisconsin has adopted this approach. State v. Bedker, 149 Wis. 2d 257, 274, 450 N.W.2d 503 (Ct. App. 1989); State v. Kaster, 148 Wis. 2d 789, 436 N.W.2d 891 (Ct. App. 1989).

In general, misconduct evidence may be relevant even if not similar to the charged crime. United States v. McFadyen-Snider, 552 F.2d 1178 (6th Cir. 1977). However, the state must demonstrate a connection between the defendant and the act. Huddleston v. United States, 485 U.S. 681 (1988); State v. Schindler, 146 Wis. 2d 47, 429 N.W.2d 110 (Ct. App. 1988). The state must demonstrate, by a preponderance of the evidence, that a jury could reasonably conclude that the act occurred and the defendant was the actor. Huddleston, 485 U.S. at 690-91; Dowling v. United States, 493 U.S. 342, 348 (1990).

The state must demonstrate that the evidence concerns a fact of consequence; that is, a fact in substantial dispute. See State v. Sorenberg, 117 Wis. 2d 159, 344 N.W.2d 95 (1984); State v. Goldsmith, 122 Wis. 2d 764, 364 N.W.2d 178 (1985). It is reversible error to admit misconduct evidence when the point to be proven is not in issue due to a stipulation. U.S. v. DeVaughn, 611 F.2d 42 (2nd Cir. 1979); State v. McAllister, 153 Wis. 2d 523, 529, 451 N.W.2d 764 (Ct. App. 1989); State v. Harris, 123 Wis. 2d 231, 235-39, 365 N.W.2d 922 (Ct. App. 1985). The court must consider whether the evidence tends to make the fact of consequence more or less probable than without the evidence. Section 904.01. Once the court has determined that the evidence is relevant, it must next decide whether the evidence is offered for a legitimate purpose.

Motive

Motive is generally considered a state of mind or an emotion that causes a person to act in a certain way. It is the reason which leads the mind to desire the result of the act. State v. Fishnick, 127 Wis. 2d 247, 260, 378 N.W.2d 272 (1985). Motive is different from plan since motive explains why a person acted in a particular manner, while plan explains the intentional steps taken by a person to reach a goal. State v. Balistreri, 106 Wis. 2d 741, 756, 317 N.W.2d 493 (1982). The term "motive" is given such a broad definition that at times it is synonymous with the definition of propensity. State v. Friedrich, 135 Wis. 2d 1, 51-52, 398 N.W.2d 763 (1987) (Heffernan, C.J., dissenting); Fishnick, 127 Wis. 2d at 235; Day v. State, 92 Wis. 2d 392, 404, 284 N.W.2d 666 (1979).

Other acts evidence is relevant and admissible for showing an accuser's motive to make a false accusation against a defendant. State v. Johnson, 184 Wis. 2d 324, 338, 516 N.W.2d 463 (Ct. App. 1994). Further, extrinsic evidence can be used to prove a witness has a motive to testify falsely. State v. Williamson, 84 Wis. 2d 370, 383, 267 N.W.2d 337 (1978).

Evidence of uncharged misconduct has been introduced even though it does not demonstrate a specific motivation but a generalized urge. Thus, jealousy, the desire for property, avoiding arrest, or escaping from custody may be motives for murder. For instance, in State v. Wys, the Supreme Court explained that jealousy is not a particular character trait, but, rather, a particular emotional state that provided motive and intent for the crime. State v. Wys, 124 Wis. 2d 681, 712, 370 N.W.2d 745 (1985).

The prosecution has also been allowed to introduce the evidence of uncharged drug abuse to prove the pecuniary motive for property crimes such as burglary. United States v. Lee, 509 F.2d 400 (D.C. Cir. 1974). The motive definition becomes even broader when courts rely on the "greater latitude" standard invoked in cases involving sexual offenses. Hendrickson v. State, 61 Wis. 2d 275, 277-79, 212 N.W.2d 481 (1973); Friedrich, 135 Wis. 2d at 38.

Plan

Evidence of plan demonstrates that the defendant's conduct is caused by a concise commitment to a larger goal of which the crime charged is only a part. C. Wright and K. Graham, supra., at Section 5244; United States v. Cepulonis, 530 F.2d 238 (1st Cir. 1976). Thus, if the other acts are separate incidents, not related to steps in a plan, the evidence is inadmissible as a plan. Balistreri, 106 Wis. 2d at 756-57; State v. Harris, 123 Wis. 2d 231, 239, 365 N.W.2d 922 (Ct. App. 1985). As with motive, Wisconsin has adopted a greater latitude approach to other act evidence sought to be admitted under the plan theory. Hendrickson v. State, supra.

Identity

The threshold measure for similarity with regard to admission of other acts to prove identity is nearness of time, place, and circumstances of other acts to the crime alleged. State v. Kunst, 160 Wis. 2d 722, 467 N.W.2d 531 (1991). Importantly, the standards of probativeness and relevance are stricter when other acts evidence is used to show identity because of the greater prejudice that accompanies such evidence. Id. Numerous similarities may establish identity: place, time, tools used, clothing worn, character of victim, and modus operandi. State v. Calvert, 505 P.2d 1110 (1973). Thus, if the charged crime was not committed with the same distinctive modus, it should be excluded. State v. Manrique, 531 P.2d 239 (1975).

Absence of Mistake or Accident

Other act evidence may also be sought to be admitted to rebut defenses such as mistake, inadvertence, accident, or entrapment. This involves the doctrine of chances (the improbability of repeated accidents) which has been adopted by the U.S. and Wisconsin Supreme Courts. McQuire v. Estelle, ___U.S.____ (1991); State v. Evers, infra. The similarities between the act charged and the other acts need not be as extensive and striking as those required under identity, and the various acts need not be manifestations of a
unifying plan, as required for purpose. However, in order for the court to admit evidence under this theory, a defendant must expressly or impliedly defend on the ground of accident or mistake. See generally, United States v. Wischmeyer, 624 F.2d 840 (8th Cir. 1980)

Intent
Like the exception for absence of mistake, the exception for intent focuses on the similarity of prior acts. State v. Evans, 139 Wis. 2d 424, 435, 443-44, 407 N.W.2d 256 (1987). Unless the crimes are similar, the inference of intent can arise only if the inference of bad character is first drawn. Thus, if a like occurrence takes place enough times, it can no longer be attributable to mere coincidence. If a defendant is charged with knowingly receiving stolen property, evidence that the defendant had on earlier occasions received stolen goods under suspicious circumstances from the same transferor is admissible to prove that on the occasion charged he or she knew the goods in question had been stolen. 2 J. Wigmore, Evidence Section 324-25. Under this theory, the larger the number of similar incidents, the smaller the probability that the defendant was innocently victimized on all those occasions. See, State v. Roberson, 157 Wis. 2d 447, 454-55, 459 N.W.2d 611 (Ct. App. 1990).

Knowledge
Knowledge is an essential element of crimes like receiving stolen property and possession of controlled substances. See, e.g., U.S. v. Moccia, 681 F.2d 61, 63 (1st Cir. 1982) (prior marijuana conviction relevant to the issue of knowledge). Essentially, this exception shows that a person has guilty knowledge at the time of the crime. U.S. v. Fleming, 739 F.2d 945, 949 (4th Cir. 1984). The knowledge required must be more than the knowledge that it is wrong to commit a crime; rather, it must be the state of knowledge that is in dispute in the case. State v. Evans, 139 Wis. 2d 424, 435, 443-44, 407 N.W.2d 256 (1987). Naturally, to show knowledge, the misconduct must have occurred prior to the charged event. State v. Roberson, 157 Wis. 2d 447, 454-55, 459 N.W.2d 611 (Ct. App. 1990).

Context
Another legitimate purpose is the complete story or context exception; that is, that the evidence is necessary to give a full presentation of the case. State v. Bergeron, 162 Wis. 2d 521, 529-31, 470 N.W.2d 322 (Ct. App. 1991); State v. Schillieut, 116 Wis. 2d 227, 341 N.W.2d 716 (Ct. App. 1983), aff'd, 119 Wis. 2d 788, 350 N.W.2d 686; State v. Clemons, 164 Wis. 2d 506, 476 N.W.2d 283 (Ct. App. 1991); State v. Pharm, 115 Wis. 2d 354, 340 N.W.2d 498 (1983).

Probative Value vs. Prejudicial Effect
Like any other evidence sought to be admitted, misconduct evidence must be logically relevant to a material fact. See, Sec. 904.01. If the misconduct evidence does not make a material fact more or less probable, it is inadmissible. Sec. 904.02.

In addition to logical relevance, misconduct evidence must be legally relevant. This is a determination of the prosecution's need for the evidence balanced with the prejudicial nature of the misconduct evidence. One expert conditions the prosecution's need for the evidence on consideration of four factors: 1) strength of the proof of the uncharged act; (2) how probative the uncharged act is of the fact it is offered to prove; (3) the availability of other evidence to prove the fact of consequence; (4) the degree the fact of consequence is disputed. Irwinbierdied, Uncharged Misconduct Evidence (1984) Chap. 8. The prosecution has little need for misconduct evidence if there is less prejudicial evidence or has a strong case without such evidence. U.S. v. Beechhine, 382 F.2d 898 (en banc). U.S. v. Cochran, 546 F.2d 27 (5th Cir. 1977); U.S. v. DiZenza, 500 F.2d 263 (4th Cir. 1974).

In this context, trial courts should be reminded that there is a general exclusion to misconduct evidence. State v. Goldsmith, 122 Wis. 2d 754-57, 364 N.W.2d 178 (Ct. App. 1985); State v. Stephenson, 381 P.2d 335 (Kan. 1963).

Notice
Section 904.04(2) is virtually identical to Federal Rule 404(b) except that the federal rule requires the prosecution to provide, if requested by the defendant, "reasonable notice in advance of trial" of its intent to use misconduct evidence unless advance notice is excused for "good cause." See United States v. Foisy, 636 F.2d 517, 526, n. 8 (D.C. Cir. 1980). The federal rule is consistent with that adopted in more than 25% of the states and in several federal circuits. Berger, "The Federal Rules of Evidence: Redefining the Goals of Codification," 12 Hofstra L. Rev. 255, 268-69 (1984).

The rationale behind requiring pretrial notice is to provide the defendant a meaningful opportunity to prepare for trial and defend against the uncharged misconduct. State v. Just, 602 P.2d 957 (Mont. 1979); State v. Acquain, 381 A.2d 239 (1977); State v. Priester, 277 So. 2d 126 (La. 1973). Arguably, this is a more reasoned approach than that taken in Wisconsin caselaw holding that the prosecutor has no duty to provide notice. Cheney v. State, 44 Wis. 2d 454, 171 N.W.2d 1 (1969); Whitty v. State, 34 Wis. 2d 278, 297, 149 N.W.2d 557 (1967); Note, "Criminal Law: Evidence of Prior Misconduct: Whitty v. State," 51 Marq. L. rev. 104, 109 (1967).

A recent Wisconsin appellate court decision reversed a criminal conviction based on trial court error in admitting "other acts" evidence for which the state, after demand by the defense, gave the information at the "eleventh hour." State v. Fink, 195 Wis. 2d 330, 536 N.W.2d 401 (Ct. App. 1995). In Fink, two months prior to trial, the defense filed a written demand for notification of any "other acts" evidence the state intended to use. Five days later, the defense filed a motion to compel disclosure of the evidence. The state did not comply with the demand until one week before trial. Defense counsel objected to untimely compliance and requested an adjournment, which was denied by the court. Rejecting the state's contention that the defense could not have been surprised by the evidence because the information was contained in the police reports, the court of appeals reversed, explaining "[w]hat may have been in the police reports regarding 'other acts' and what the State intended to produce at trial are two completely different things." 195 Wis. 2d at 340. However, this decision was based primarily on sixth amendment and due process concerns, where the appellate court found a direct correlation between the charge of insufficient preparation time and a compromised defense. It did not create any explicit new law on notice in Wisconsin.

Role of Defense Counsel
In the majority opinion in Fink, Judge Brown characterized the defense as "an excellent illustration of the proper way to make a record showing prejudice." Id. Defense counsel should insist, in a
motion in limine before trial, that the prosecution be prohibited from introducing any such evidence if defense counsel has not received notice that such evidence would be introduced at trial. However, counsel is warned that a court may feel such an objection is precluded unless counsel demands to be put on notice of such evidence in a discovery demand and can articulate the prejudice to putting on an adequate defense.

Some trial courts require trial counsel to sign pretrial orders for motions and final pretrial and trial dates. Do not sign these documents without reading these orders! Most indicate that you have received discovery and give you ten days to file all motions. This is impossible to do if you have not received discovery, received incomplete discovery or not received discovery received (because you just received the case). You should strike this language on the order as well as any other incorrect information.

Do not be afraid to add to the order. You should include a paragraph that indicates that at the time you are signing the order, you are not on notice of any other act evidence, medical records, photographs or other evidence not received from the prosecution.

If the State later seeks to introduce "other crimes" evidence on the day of trial, your motions in limine, your discovery demand, and any pretrial orders will demonstrate that you requested this evidence and were led to believe this evidence did not exist. This may provide a basis for exclusion of the evidence as violative of the pretrial order. Pretrial orders control the subsequent course of a trial and evidence is properly excluded for lack of compliance with the order. See Pittsburgh v. Continental Ins., 73 Wis. 2d 273, 282, 243 N.W.2d 805 (1976); Schneck v. Mus. Service Cas. Ins., Co., 18 Wis. 2d 566, 572-73, 119 N.W.2d 342 (1963). See also, Fink, supra. At the very least, counsel should be entitled to an adjournment to investigate the proposed evidence. State v. Fink, supra.

Defense counsel should also insist that the prosecution meet the foundational requirements for any uncharged misconduct evidence to be admitted and carefully preserve objections to any use by the prosecution of uncharged misconduct evidence, as not falling within an exception to the general rule of exclusion.

If the court admits uncharged misconduct evidence, defense counsel should insist on a limiting instruction. See, Imwinkelried and Schwed, "The Reform of Limiting Instruction on Uncharged Misconduct Evidence," 11 The Champion (March 1987) at 6. Of course, trial counsel should argue that the uncharged misconduct evidence should not be admitted since it is impossible to write a limiting instruction that would cure the prejudicial effect of the evidence and limit the jury to using the evidence for legitimate purposes. Shilling, 116 Wis. 2d at 238. As Justice Jackson stated, "(t)he naive assumption that prejudicial effect can be overcome by instructions to the jury... all practicing lawyers know to be unmitigating fiction." Krulewitch v. United States, 336 U.S. 440, 453 (1949) (Jackson J., concurring).

Conclusion

A trial court has considerable latitude as to admitting evidence. §906.11(1), State v. Harris, 123 Wis. 2d 231 (Ct. App. 1985); State v. King, 120 Wis. 2d 285 (Ct. App. 1984). Since evidence of uncharged misconduct can be so prejudicial to the defendant, counsel must try to limit or exclude its introduction and ensure that the court conducts the mandatory tests for admissibility. While it may be proper to admit other act evidence when logically and legally relevant to a disputed issue, the defense must 1) demand the information well in advance of the trial; 2) require a showing that the evidence concerns a fact of consequence; 3) require the prosecution to show that the evidence falls into one of the proper purpose exceptions; and 4) put the prosecutor to the test on whether the probative value of the evidence substantially outweighs any unfair prejudice.

End Note

For example, in Minnesota the three exceptions for which advance notice is excused for good cause are: offenses that are part of the same transaction for which the defendant is being tried, offenses that have previously gone to trial and offenses used to rebut the defendant's good character evidence. See State v. Spiegel, 139 N.W.2d 167 (Minn. 1965); Comment, "Developments in Evidence of Other Crimes," 7 J. Law Reform 535, 546-50 (1974).
December 14, 2006

A Guide to Grading Exams
posted by Daniel J. Solove

It's that time of year again. Students have taken their finals, and now it is time to grade them. It is something professors have been looking forward to all semester. Exactness in grading is a well-honed skill, taking considerable expertise and years of practice to master. The purpose of this post is to serve as a guide to young professors about how to perfect their grading skills and as a way for students to learn the mysterious science of how their grades are determined.

Grading begins with the stack of exams, shown in Figure 1 below.

![Image of exams](image1.png)

The next step is to use the most precise grading method possible. There never is 100% accuracy in grading essay exams, as subjective elements can never be eradicated from the process. Numerous methods have been proposed throughout history, but there is one method that has clearly been proven superior to the others. See Figure 2 below.

![Image of grading method](image2.png)

The key to this method is a good toss. Without a good toss, it is difficult to get a good spread for the grading curve. It is also important to get the toss correct on the first try. Exams can get
crumpled if tossed too much. They begin to look as though the professor actually read them, and this is definitely to be avoided. Additional tosses are also inefficient and expend needless time and energy. Note the toss in Figure 3 below. This is an example of a toss of considerable skill -- obviously the result of years of practice.

![Image](image1.jpg)

Note in Figure 3 above that the exams are evenly spread out, enabling application of the curve. Here, however, is where the experts diverge. Some contend that the curve ought to be applied as in Figure 4 below, with the exams at the bottom of the staircase to receive a lower grade than the ones higher up on the staircase.

![Image](image2.jpg)

According to this theory, quality is understood as a function of being toward the top, and thus the best exams clearly are to be found in this position. Others, however, propose an alternative theory (Figure 5 below).
They contend that the exams at the bottom deserve higher grades than the ones at the top. While many professors still practice the top-higher-grade approach, the leading authorities subscribe to the bottom-higher-grade theory, despite its counterintuitive appearance. The rationale for this view is that the exams that fall lower on the staircase have more heft and have traveled farther. The greater distance traveled indicates greater knowledge of the subject matter. The bottom higher-grade approach is clearly the most logical and best-justified approach. Even with the grade curve lines established, grading is far from completed. Several exams teeter between levels. The key is to measure the extent of what is referred to as "exam protrusion." Exams that have small portions extending below the grade line should receive a minus; exams with protrusions above the grade lines receive a plus. But what about exams that are right in the middle of a line. In Figure 6 below, this exam teeters between the A and B line. Should it receive an A- or a B+?

This is a difficult question, but I believe it is clearly an A-. The exam is already bending toward the next stair, and in the bottom-higher-grade approach, it is leaning toward the A-. Therefore, this student deserves the A- since momentum is clearly in that direction.
Finally, there are some finer points about grading that only true masters have understood. Consider the exam in Figure 7 below. Although it appears on the C stair and seems to be protruding onto the B stair, at first glance, one would think it should receive a grade of C+. But not so. A careful examination reveals that the exam is crumpled. Clearly this is an indication of a sloppy exam performance, and the grade must reflect this fact. The appropriate grade is C-.

![C-](image)

One final example, consider in Figure 8 below the circled exam that is very far away from the others at the bottom of the staircase. Is this an A+?

![A+](image)

Novices would think so, as the exam has separated itself a considerable distance from the rest of the pack. However, the correct grade for this exam is a B. The exam has traveled too far away from the pack, and will lead to extra effort on the part of the grader to retrieve the exam. Therefore, the exam must be penalized for this obvious flaw. As you can see, grading takes considerable time and effort. But students can be assured that modern grading techniques will produce the most precise and accurate grading possible, assuming professors have achieved mastery of the necessary grading skills.
**DISCLAIMER FOR THE GULLIBLE**: This post is a joke. I do not grade like this. Instead, I use an even more advanced method -- an eBay grade auctioning system.

Posted by Daniel J. Solove at December 14, 2006 01:09 AM

**Comments**

My 4 year old son, who is mastering the ABCDs, often provides useful and cost-effective labor to assist with grading. Eric.

*Posted by: Eric Goldman at December 14, 2006 01:15 AM*

Funny coincidence, Eric. My much younger kids have only gotten A, B, and (less helpful) H down. So, bad news for the Associate Dean who wants me to follow the curve; great news for my students!

Hilarious post Dan. You must've gotten some odd looks while doing this.

*Posted by: Paul Ohm at December 14, 2006 01:27 AM*

Paul -- Fortunately, nobody saw me create the post, but I got locked in the stairwell and had to walk down 8 flights of stairs to exit. The things I do for the art of blogging . . .

*Posted by: Daniel J. Solove at December 14, 2006 01:32 AM*

That is *so* unfair!! I can't believe how little you care about your students.

Clearly, the only proper way to grade the exams is by drawing large circles on the floor representing each letter grade, and tossing the exams in the air.

I am so glad I'm not in your class.

*Posted by: Dave! at December 14, 2006 01:46 AM*

Great - this is so much better than my legacy method. We used to have numeric grades here in Norway, and then I could just measure each paper and multiply with a factor (thin paper - good grade). An intermediate solution with lots of if..then.. in the spreadsheet has proved unsatisfactory, but our new building has lots of staircases that seem purpose-built for grading tosses. Maybe I will have time for celebrating Christmas after all....

*Posted by: Espen at December 14, 2006 04:55 AM*

Personally I prefer the Standardized Lottery grade Awarding Method (SLAM) where grades are awarded according to a draw. This is an entry level method and I know it's time consuming, but it's still fair.

Furthermore, I understand through this Standardized Toss Down Stair Case grade Awarding Method (STD-SCAM or STanDard-SCAM as it is commonly referred to) that it's important to either hand in first (be in bottom of the pile) or deliver last (in order to be on top of the pile). The problem is to know if you hand out the grade A from the top or the bottom of the stair case.

*Posted by: Kristian at December 14, 2006 07:10 AM*

Clearly the "higher grade at the bottom" is correct, but for reasons opposite to those you describe: A little theoretical physics and experimentation has convinced me that the heavier exams fall
sooner than the lighter ones and tend to drop first, i.e., higher up the stairs. There are two reasons for giving lower grades to heftier exams: (1) Expert exam writers/graders quickly learn to write questions that are best answered by pithy responses from knowledgable persons. Less prepared students and those with little test savvy will usually attempt to "snow" the professor with extensive, rambling, and unresponsive persiflage. Such behavior must be crushed. (2) It is good if deans and the occasional student seem to see you assiduously grading exams. Lighter exams make easier reading in such circumstances. Students who write these useful exams should be rewarded. I did learn valuable pointers from this site about grading papers that teeter between steps. One issue you did not cover was exams that "fall between the cracks". This can be a major problem both in older universities with wooden staircases and extremely modern ones with cantilevered concrete risers. My solution has been to give these the lowest possible passing grade, since they create additional work for the grader. On the other hand, this has gained me a reputation among students and colleagues as being somewhat of a tartar

Posted by: David Cavanagh at December 14, 2006 08:29 AM

Heheheh. I have about 100 papers to grade by Friday of next week and a system like this is very tempting.

Posted by: Luke G. at December 14, 2006 08:30 AM

Having not had quite as many years as Dan in teaching, I do hesitate to correct his obvious mastery of this grading skill, but I must make one point for the sake of clarity, should someone mistake graduate level grading with undergraduate level grading.

The essence of the method is the same for both, but for undergraduate grades, the professor should toss up the stairs rather than down. With the grade scale still extending away from the professor (higher up the stairs will be a higher grade).

This makes sense, since undergraduate students cannot have developed as a refined sense of the subject matter as graduate students and the tossing up will naturally take this into account using gravity to appropriately adjust the curve.

Posted by: Ken Mortensen at December 14, 2006 08:42 AM

Ya gotta throw em over your shoulder, to assure impartiality!

Posted by: anon at December 14, 2006 08:44 AM

It is comforting to know that professors get just as punchy around finals time as students do! :) "(2) It is good if deans and the occasional student seem to see you assiduously grading exams. Lighter exams make easier reading in such circumstances. Students who write these useful exams should be rewarded."

If only my own professors would take this into account, and reward me for brevity! (Lack of knowledge has nothing to do with it, of course.)

Posted by: Meg at December 14, 2006 08:51 AM

Interesting. I believe my school issued grades based on handwriting quality. First year, handwritten exams with my atrocious penmanship, mostly middle of the curve grades. Really, my name should have been Joe B. Curve. Second year, I moved to the typing room... bada bing! A .2 improvement across the board, into that rarified 57% percentile region! Yes - Instead of
being perfectly mediocre, now only 43% of all students in my class were better human beings and more worthy than me in every respect, thanks to International Business Machines and their excellent Selectric III.
I don't recall what happened third year because I was drunk and golfing the whole time, normally with a couple other students and and a couple business law professors who made millions and didn't really see teaching one or two classes a year as work. The intensive effort on my drinking and golfing has definitely paid benefits in my post law school life. If I had known the importance of drinking and golfing at the start of law school, I think I might have skipped law school and just worked on my short game, and sunk the student loans into Bud Lite. I think that's what that latter-day Clarence Darrow, John Daly, is up to. I hear he's been admitted to the bars in many states.

**Posted by:** Al Maviva at December 14, 2006 10:22 AM

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This is a most entertaining post. Thanks, Dan!

**Posted by:** Darian Ibrahim at December 14, 2006 10:39 AM

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I am sure you will all be interested in a new proprietary software program for use with electronically filed exams: Active Test Adjudication and Result Insertion (ATARI). The program creates a random swarm of exam papers and simulates hurling them toward the viewer of the computer monitor. Using the arrow keys (or a joystick) the "grader" fires photon "grades" at the attacking papers; each "hit" is assigned a random grade according to preset curve data, thus assuring a double-random result (which self-evidently is as normatively "fair" as any student could wish.) A counter at the bottom of the screen shows the remaining supply of each letter grade, but not which one will be fired next. Exams that "get by" the photon killing zone are automatically assigned the midpoint of the requisite curve, so that the grader is granted the joy of greater "result randomness" as his/her accuracy increases. This keeps the grader mentally "in the game," which is something students often deserve.

**Posted by:** NWAAR at December 14, 2006 10:56 AM

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Funny post, but my question is this: if you really grade exams by tossing them down the stairs, why is it that it takes you lazy bastards so long to get me my grades? Since most of you teach the same crap each year and grade students ONCE every six months, I would think you could expedite the process a bit more.

**Posted by:** Mike at December 14, 2006 12:35 PM

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This is a hilarious post. I felt compelled to disclose my grading system over at Legal Profession Blog

**Posted by:** Jeff Lipshaw at December 14, 2006 01:13 PM