
 (especially co-conspirators)

Rule 806

Only applies to hearsay statements offered for the truth.

-U.S. v. McCain, 934 F.2d 822, 832-33 (7th Cir. 1991)

(co-conspirators statements admitted only to put defendant's statements in context not admitted for the truth; Rule 806 did not apply)

1. **Impeach anyone who doesn't show up.** 

(especially co-conspirators)

Rule 806

Motions Issues:

Brady/Giglio disclosure

Severance



U.S. v. Jackson

345 F.3d 59, 70 (2d Cir. 2003)

Brady applies to impeachment of
declarants under 806



U.S. v. Perez

299 F. Supp.2d 38 (D. Conn. 2004)

Defendant's severance motion
granted



ALWAYS, ALWAYS, ALWAYS --

Renew your motions at trial

See, e.g., Maynard v. State, 685 S.W.2d 60
(Tex. Crim. App. 1985) (motions in limine
do not preserve error when the motion or
objection is not renewed at trial)

1. Impeach anyone who doesn't show up. ◀
(especially co-conspirators)


Rule 806 - Uses

- Prior Convictions
- Inconsistent Statements
- Bias and Motive
- Opinions and Reputation
- Bolstering a Witness

1. Impeach anyone who doesn't show up. ◀
(especially co-conspirators)

Rule 806 - More Strategies

- Extrinsic Evidence May be Admissible under Rule 608(b) in Federal Court
- Defense Attacking Reliability of the Defendant's Out-of-Court Statements
- Advanced Course: Other Creative Uses of Rule 806





Even if your client never testifies!



Appling v. State

904 S.W.2d 912 (Tex. Ct. App. – Corpus Christi 1995)

Credibility of declarant can be attacked when the declarant is a non-testifying defendant

During the PROSECUTION'S direct!

Rule 106:

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



Tex. R. Evid. 106 provides, in part:

When a writing or recorded statement or part thereof is introduced by a party, an adverse party may at that time introduce any other part or any other writing or recorded statement which ought in fairness to be considered contemporaneously with it. "Writing or recorded statement" includes depositions.




Tex. R. Evid. 107 provides, in part:


When part of an act, declaration, conversation, writing or recorded statement is given in evidence by one party, the whole on the same subject may be inquired into by the other, and any other act, declaration, writing or recorded statement which is necessary to make it fully understood or to explain the same may also be given in evidence, as when a letter is read, all letters on the same subject between the same parties may be given...

3. Get YOUR Evidence in Front of the Jury.
During the PROSECUTION'S direct!

Rule 106: Applying the Rule



Do NOT wait until Cross Examination
(check the rules of your jurisdiction)

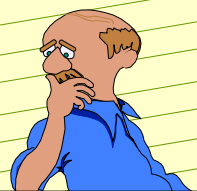


Usually does NOT apply to oral statements (unless recorded)

3. Get YOUR Evidence in Front of the Jury.
During the PROSECUTION'S direct!

Rule 106: Questions

What if evidence is otherwise inadmissible?
When is a writing or recording "complete"?



3. Get YOUR Evidence in Front of the Jury.
During the PROSECUTION'S direct!

Rule 106: Opening the Door
Be careful: The Prosecution Can Use it Too!



Tex. R. Evid. 801(e)(2)

[a] statement is not hearsay if...[it] is offered against a party and is:

- (A) the party's own statement, in either an individual or representative capacity, or
- (B) a statement in which the party has manifested an adoption or belief in its truth, or
- (C) a statement by a person authorized by the party to make a statement concerning the subject, or
- (D) a statement by the party's agent or servant concerning a matter within the scope of agency or employment made during the existence of the relationship.



4. Make the Prosecution EAT Its Words.

- Admissions Covered

- Admissions from Other Cases
- Admissions from the Bill of Particulars
- Admissions from Pretrial Proceedings
- Admissions from Search Warrants
- Admissions by Informants
- Admissions in Writings
- Admissions on Appeal





Rodela v. State

829 S.W.2d 845 (Tex. Ct. App. – Houston 1st Dist. 1992)

Statement by investigator with the Houston Police Department regarding coercing a confession from defendant constituted an admission by a party-opponent under Tex. R. Crim. Evid. 802(e)(2)D



See also Anne Bowen Poulin, “Party Admissions in Criminal Cases: Should the Government Have to Eat Its Words?”

- 87 Minn. L. Rev. 401 (2002)



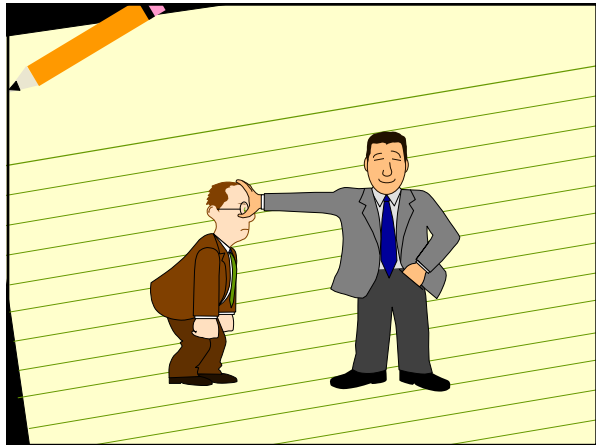
MINING FOR ADMISSIONS

- M-DQ DA for Violation of Ethical Rules and Gag Order
➔ Additional benefit: Get admissions from the State
- M-Due Process - Based on Prejudicial Pretrial Publicity
➔ Goal to win; educate the court; used State's admission from disqualification motion
- M- Change of Venue
➔ Court agreed to change venue out of OKC

4. Make the Prosecution EAT Its Words.

- Non-Evidentiary Issues
 - Judicial Estoppel
 - Due Process









Fed. Rule Evid. 608(b):



Specific instances of conduct of a witness, for the purpose of attacking or supporting the witness's credibility, other than conviction of a crime as provided In Rule 609, may not be proved by extrinsic evidence.

 **6. Use that Lie!** 

Fed. R. Evid. 608(b):


They may, however, in the discretion of the Court, if probative of truthfulness or untruthfulness, be inquired into on cross examination of the witness

- (1) concerning the witness's character for truthfulness or untruthfulness
- (2) concerning the character for truthfulness or untruthfulness of another witness as to which character the witness being cross-examined has testified.

 **6. Use that Lie!** 

Fed. R. Evid. 608(b):

The giving of testimony, whether by an accused or by any other witness, does not operate as a waiver of the accused's or the witness's privilege against self-incrimination when examined with respect to matters which relate only to credibility.



Texas Rule of Evidence 608(b)

Specific instances of the conduct of a witness, for the purpose of attacking or supporting the witness' credibility, other than conviction of crime as provided in Rule 609, may not be inquired into on cross-examination of the witness nor proved by extrinsic evidence.

