TAKING THE OFFENSIVE: PROACTIVE USE OF THE RULES OF EVIDENCE

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Defense attorneys tend to think of the rules of evidence defensively — how do I minimize the damage? — rather than as tools for actively putting the defense case before the jury. However, the Virginia practitioner often can use the evidentiary concepts behind the Federal Rules of Evidence to take a proactive stance in defending clients in the state courts. This article looks at the concepts behind several federal rules and suggests how the rules can be creatively used to make criminal defense in Virginia more successful. While I focus on the federal rules, where possible, I have drawn parallels to Virginia evidence law. Therefore, this article is intended not only for attorneys who defend against federal prosecutions, but for the Virginia state practitioner as well. I have compiled here just a fraction of the inventive uses possible for federal law concepts in Virginia state courts. My hope is that experienced attorneys will not only use this article as a resource, but will allow it to inspire their ability to invent other ways to use federal law concepts in state courts.

I. Keeping The Government’s Evidence In Context

A. Federal Rule 106

Imagine that during the Commonwealth’s case, the prosecutor introduced only the incriminating portions of your client’s written statement. You knew that, read as a whole, the statement was exculpatory. But by the time your case-in-chief is heard and the exculpatory parts are finally read, the jury may have decided upon your client’s guilt. Persuading the jurors that there is another side to the story of the statement is difficult. Fortunately, Federal Rule 106 provides a more palatable option than waiting your turn: “When a writing or recorded statement or part thereof is introduced by a party, an adverse party may require the part thereof to be introduced in full and to be read by the court.”

Jurors may also hold a single attorney to a much higher standard of consistency in the presentation of both phases of the trial. While it is always difficult for defense attorneys to synchronize post-guilt mitigation defenses with pre-verdict innocence theories so that the jury does not question the defense’s sincerity, a new face in the sentencing phase may lessen the effect in the jury. The split trial approach can be especially effective if the defense decides to have the defendant express remorse at the penalty stage.4

IV. Conclusion

Defendants are constitutionally entitled to quality legal assistance sufficient to prepare an adequate defense at trial; in the context of capital litigation, this means two attorneys must share the heavy responsibilities of representation. Capital defense attorneys can use co-counsel to tackle the amount of material before them by using the natural division between the guilt-innocence and penalty phases. Splitting the trial responsibilities according to the two phases will refine the focus of the defense attorneys involved. A more definite and manageable workload will allow for a more aggressive and attentive adversarial team. More importantly, this division may be crucial to the credibility of the defense throughout the trial. Not only might a jury be more likely not to convict, a credible defense team has a better chance of rescuing the penalty phase from the inherent prejudices against a defendant deemed guilty of a capital offense.

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The evidence is excludable under 403, then it is not admissible under 106. A request for a limiting instruction to correct any perceived prejudice might help to avoid the applicability of Merrick. In situations involving objections to admissibility based upon rules other than Rule 403, “fairness” may not dictate exclusion, and the Fourth Circuit may be more likely to admit the evidence.

Defense counsel should, of course, stress the other side of the coin: “fairness” may require the admission of otherwise excludable evidence so that the jury will not be misled. For example, because of the specter of promiscuity created by such testimony, it may seem unfairly prejudicial to allow a defendant to introduce documentary evidence that the prosecutrix in a rape case had sexual intercourse with other men on the day of the alleged crime. However, if the defense is that the DNA tests on the semen were incomplete and unreliable, such evidence may be necessary to explain to the jury why the tests were unreliable.

Rule 106 also allows defense counsel some control over the timing of the introduction of the evidence. It is not uncommon, for instance, for judges to justify exclusion of exculpatory testimony “for the time being” with assurances that the defendant will have the opportunity to rebut after the prosecution rests. This is precisely the type of evil, however, that the authors of Rule 106 intended to prevent: allowing irreversible beliefs to form in the jurors’ minds before they have heard all of the evidence. In the DNA example, Rule 106 would allow written or recorded statements which indicated other sexual relationships to be introduced during the government’s case. Defense counsel would also benefit from the ability to present to the jury, during the government’s case, the core of the defense — that police investigation was inadequate, and therefore, it is impossible to find the client guilty beyond a reasonable doubt without first determining the identity and culpability of the woman’s other sexual partners.

B. Application of the Rule 106 Concept in Virginia

In Virginia, the basic concept behind Rule 106, the rule of completeness, is set out in Stonestreet v. Doyle, an 1881 case which held that because the defendants offered into evidence the contents of a letter written to their agent, they could not object to the admission of the agent’s answer to the letter. The Stonestreet court stated, “[t]he rule is well settled that when letters are laid before a jury the parties affected by them have a right to the entire correspondence, that the true meaning and extent of what is written may be fully understood.”13 As Stonestreet’s rule of

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1 Fed. R. Evid. 106 (amended 1987). See also United States v. LeFevour, 798 F.2d 977, 981 (7th Cir. 1986).
2 Nancy Hollander, et. al., Taking Advantage of Underutilized Rules of Evidence, The Champion, Aug. 1994, at 4-10. There are ethical considerations accompanying this use which are beyond the scope of this article.
4 Id. For a full understanding of the rule of completeness in the context of allowing cross-examination see United States v. Smith, 794 F.2d 1333, 1335 (8th Cir.), cert. denied, 479 U.S. 938 (1986).
5 The fitness determination includes consideration of the ability of the excluded portion to explain what was admitted; to place the admitted portion in context; to avoid misleading the jury; or to ensure a fair and impartial understanding of what was admitted. Hollander, supra note 2, at 5 (citing United States v. Boylan, 896 F.2d 230, 256-257 (1st Cir.), cert. denied, 498 U.S. 849 (1990); United States v. Sveiss, 814 F.2d 1208, 1211-12 (7th Cir. 1987); United States v. Walker, 652 F.2d 708, 710 (7th Cir. 1981)).
completeness has not been affirmatively overturned, defense counsel would be reasonable in believing that it operates in Virginia today. However, because no other Virginia appellate court has used the rule since 1881, defense counsel should be prepared to articulate Rule 106's “fairness” rationale to the trial court to justify the admission of evidence during the Commonwealth's case.\textsuperscript{15}

\section*{II. Exposing The Government's Witnesses As The Culprits}

\subsection*{A. Federal Rule 404(b)}

Imagine a case in which your defense is that the state's star witness is the guilty party, or at least, the primary participant. During impeachment of this witness, you might be able to offer the jury your defense theory by showing the witness' motive, opportunity, intent, preparation, and plan to commit the crime. The jury may find that the witness is guilty of the crime and, therefore, your client is not. But even if the jury finds your client guilty, you have damaged the state's case, which may result in a lighter sentence recommendation from the jury or, in a capital case, may create some doubt, even if not a reasonable doubt, regarding the defendant's culpability. In effect, you have introduced mitigation evidence during the prosecution's case-in-chief.

Rule 404(b) is a possible avenue for eliciting information about the government's witnesses which tends to prove that those witnesses were the culpable parties rather than your client. Rule 404(b) provides that:

- 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, provided that upon request by the accused, the prosecution in a criminal case shall provide reasonable notice in advance of trial, or during trial if the court excuses pretrial notice on good cause shown, of the general nature of any such evidence it intends to introduce at trial.\textsuperscript{16}

A defendant has a right to present a “vigorously defense,” and courts have acknowledged that Rule 404(b) evidence will aid in that effort.\textsuperscript{17} In fact, it may be easier to introduce 404(b) evidence as the defense attorney against government witnesses because Rule 404(b) is primarily meant to protect defendants from undue prejudice. Consequently, some courts have allowed a more relaxed standard for admission when the bad acts of witnesses other than the accused are offered.

What is the relaxed standard? It may be simply that defense counsel must prove that the evidence is not offered to prove action in conformity therewith.\textsuperscript{18} The Second Circuit has ruled that the evidence is subject to no more than a relevancy determination — whether it is relevant to the existence or nonexistence of some fact pertinent to the defense. The court elaborated that, in general, the standard need not be a restrictive one regarding witnesses other than the accused.\textsuperscript{19} However, even under the relaxed standard, defense counsel has the burden of proving that she is using the evidence in a proper way.\textsuperscript{20}

Once admissibility is established under Rule 404(b),\textsuperscript{21} the court still must use Rule 405\textsuperscript{22} to decide method of proof issues regarding a defendant's character and Rules 608 and 609\textsuperscript{23} to decide character issues regarding other witnesses. The Rule 404(b) advisory committee also noted that whether “the danger of undue prejudice outweighs the probative value of the evidence in view of the availability of other means of proof” as well as “other factors appropriate for making [admissibility] decisions,” should be considered by the judge before 404(b) evidence is admitted.\textsuperscript{24}

The 1991 amendment to Rule 404(b) added a pre-trial notice requirement to encourage pre-trial resolution of disputes. The notice must be filed within a “reasonable” time, and although no particular form of notice is required, the notice must “apprise the (opposing party) of the commission of the act; a court should admit the evidence unless it tends to prove only propensity; a Rule 402 relevancy determination should be made; and evidence that a prosecution witness could have conducted the scheme without the defendant’s help was admissible.\textsuperscript{20} Other courts have not been so generous. The Tenth Circuit ruled that Fed. R. Evid. 404(b) applies no differently for witnesses' acts than defendants' acts, and, therefore, no relaxed standard is appropriate. Hollander, supra note 2, at 7 (citing United States v. Puckett, 692 F.2d 663, 671 (10th Cir.), cert. denied, 459 U.S. 1091 (1982) (evidence that others had been conned by a codefendant in transactions unrelated and dissimilar to the crimes charged was properly excluded on relevance grounds)). The court's ruling, however, was dicta.\textsuperscript{21}

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\item \textsuperscript{14} The court in Perkins v. Lane, 82 Va. 59 (1886), without mentioning the rule of completeness, held that “a party against whom a statement is being offered is entitled to have the entire statement admitted into evidence.” 2 Charles E. Friend, The Law of Evidence in Virginia, § 18-49 at 254 (4th ed. 1993 & Supp. 1995) (citing Perkins).
\item \textsuperscript{15} As far as the exclusion of relevant evidence is concerned, Virginia uses a balancing test much like the Rule 403 test. 1 Friend, supra note 14, § 11-2, at 451 (1993 & Supp. 1995) (citing among others Coe v. Commonwealth, 231 Va. 83, 87, 340 S.E.2d 820, 823 (1986)).
\item \textsuperscript{16} Fed. R. Evid. 404(b) (amended 1987, 1991).
\item \textsuperscript{17} Hollander, supra note 2, at 6 (citing United States v. McClure, 546 F.2d 670 (5th Cir. 1977) (exclusion of evidence that a DEA agent had intimidated three other people into selling drugs is reversible error when the defendant’s defense is that of entrapment)). \textit{See also} the Fourth Circuit case of United States v. Stamper, 765 F. Supp. 1396 (W.D.N.C. 1991) (when no physical evidence linked the defendant to the crime, the complainant’s previous allegations of sexual abuse by three other men were admissible to prove her motive of manipulating those who had custody and control over her).
\item \textsuperscript{18} Hollander, supra note 2, at 7 (citing United States v. Cohen, 888 F.2d 770, 776 (11th Cir. 1989) (the list of purposes in 404(b) for which the evidence may be admitted is not exclusive)).
\item \textsuperscript{19} Hollander, supra note 2, at 6-7 (citing United States v. Aboumoussalem, 726 F.2d 906,911 (2d Cir. 1984)). The Aboumoussalem court gave further guidance: a court should admit the evidence if a sufficient amount of evidence is available to allow a jury to find
\item \textsuperscript{20} Id. Other courts have not been so generous. The Tenth Circuit ruled that Fed. R. Evid. 404(b) applies no differently for witnesses’ acts than defendants’ acts, and, therefore, no relaxed standard is appropriate. Hollander, supra note 2, at 7 (citing United States v. Puckett, 692 F.2d 663, 671 (10th Cir.), cert. denied, 459 U.S. 1091 (1982) (evidence that others had been conned by a codefendant in transactions unrelated and dissimilar to the crimes charged was properly excluded on relevance grounds)). The court’s ruling, however, was dicta.
\item \textsuperscript{21} Huddleston v. United States, 485 U.S. 681 (1988) (sufficiency of the evidence is the standard of admissibility for 404(b) evidence).
\item \textsuperscript{22} Fed. R. Evid. 405 allows testimony as to reputation and testimony in the form of an opinion. It is within the court's discretion whether, on cross examination, inquiry may be made into specific instances of conduct. Only in cases in which the character of the defendant is an essential element of the charge may direct examination delve into specific instances of conduct.
\item \textsuperscript{23} Fed. R. Evid. 608 and 609 will be discussed in section IV, V, and VI of this article.
\item \textsuperscript{24} Fed. R. Evid. 404(b), advisory committee notes, 56 F.R.D. 183, 219.
\end{itemize}
general nature of the evidence of extrinsic acts." Notably, the 1991 amendment explicitly states that the notice requirement is not meant "to supersede other rules of admissibility or disclosure such as the Jencks Act ... nor require the prosecution to disclose directly or indirectly the names and addresses of its witnesses." However, 404(b) evidence is inadmissible if the notice requirement is not met.

B. Application of the Rule 404(b) Concept in Virginia

Virginia law employs the Rule 404(b) concept by allowing other crimes, wrongs, or acts to be admissible against the accused if they are offered for nonpropensity purposes. However, evidence of prior bad acts of witnesses, except those which resulted in convictions, is rarely admissible.

Evidence of the "character" of a victim in a sex case may be proven by specific instances of sexual conduct which tend to rebut evidence of force, threat, or intimidation or tend to prove motive to fabricate the charge. Additionally, evidence of prior false accusations made by the complaining witness are admissible. Likewise, unadjudicated acts of perjury are admissible, as is the character of the victim of a homicide when the defendant claims self-defense. Because Virginia law tends to be less favorable in allowing admission of prior bad acts of witnesses than Federal Rule 404(b), defense counsel should be prepared to articulate how the prior bad act is essential to establishing the defense's contention that someone other than the defendant committed the crime. Such a contention should be phrased in terms of the Confrontation Clause and due process to ensure that the issues are federalized for later review.

III. Bad Police Habits and Prejudicial Routine Departmental Practices

A. Federal Rule 406

If a police department has a routine practice of conducting part of an investigation in a particular way which is prejudicial to your client, evidence of the routine practice may impeach the entire investigation. An example of such a practice is holding conferences with the prosecuting attorney during which decisions are made to test only material which is likely to link your client to the crime or to destroy exculpatory evidence. Rule 406 can be used both during impeachment of the government's witnesses and during the defense case to combat such unfair practices.

More frequently, circumstances arise in which Rule 406 would be beneficial in an attempt to admit specific evidence of ineffective investigation of the crime. The particular facts of some cases may allow this rule to be used against witnesses other than police officers. The rule states:

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 practice.

When using 406, defense counsel must first prove the existence of the habit or routine practice. Once established, the habit or routine must be used to prove a specific act on a particular occasion; consequently, defense counsel must show the likelihood that the routine was followed during investigation of the defendant's case and how the routine practice affected the ability of the investigation to produce reliable evidence.

An important note upon the practical operation of Rule 406 relates to the phrase in the rule "regardless of the presence of eyewitnesses." This phrase has been interpreted broadly enough to mean that evidence contradicting eyewitness testimony is admissible. For instance, the Tenth Circuit admitted evidence that a dentist had a habit of advising patients that extraction of the third molar risks nerve damage. The victim testified that she was not told of the risk, and the trial court did not note that it found her to be untruthful. Although the doctor could not affirmatively state that he did inform her of the risk, the court ruled that the contradiction between the habit evidence and the victim's eyewitness testimony should bear upon the weight of the habit evidence, rather than the overall admissibility. The court explicitly stated that habit and routine practice evidence is not second class evidence.

Although obtaining evidence of bad habits and practices from a close-knit, protective organization such as a police department may be difficult, means do exist. Former detectives who have retired and become investigators for public defenders' offices may provide good starts. Sometimes a presently employed officer may purposefully or unwittingly provide evidence or leads at some stage of the criminal proceedings. Other criminal defense attorneys are always excellent sources of information. In some areas, the criminal defense bar has an organized system for exchanging information on a wide variety of issues.

References:

25 Fed. R. Evid. 404(b) (1991 Amendment notes). Although the 1991 Amendment notes state, "[t]he rule expects that counsel for both the defense and the prosecution will submit the necessary request and information in a reasonable and timely fashion," the unambiguous language of the rule itself states, "upon request of the accused, the prosecution in a criminal case shall provide reasonable notice," and obviates interpretation of the legislative history. Therefore, defense counsel should not be required to provide notice nor submit 404(b) information to the prosecution.


27 1 Friend, supra note 14, § 5-5 at 185-86. In addition, the accused may have a constitutional right to present evidence of a victim's sexual conduct. Id. (Supp. 1995).

28 1 id. § 4-2 at 111.

29 1 id. § 4-2 at 112 (citing Lambert v. Commonwealth, 9 Va. App. 67, 383 S.E.2d 752 (1989)).

30 1 id. § 5-9 at 193.

31 1 id. § 4-2 at 112 (citing United States v. Laymon, 730 F. Supp. 332, 338 (D. Colo. 1990) (admission of a particular police officer's pattern of misconduct in making pretextual traffic stops)). See Brady v. Maryland, 373 U.S. 83 (1963) and Kyles v. Whitley, 115 S. Ct. 1555 (1995), for precedent that such evidence is both discoverable before trial and relevant to guilt and penalty determinations. Additionally, remember that People v. Simpson was good for something: potential jurors across the nation have seen that police departments can be incorrigibly ineffective.

32 Id. at 158.

33 Hollander, supra note 2, at 7 (citing United States v. Laymon, 730 F. Supp. 332, 338 (D. Colo. 1990) (admission of a particular police officer's pattern of misconduct in making pretextual traffic stops)). See Brady v. Maryland, 373 U.S. 83 (1963) and Kyles v. Whitley, 115 S. Ct. 1555 (1995), for precedent that such evidence is both discoverable before trial and relevant to guilt and penalty determinations. Additionally, remember that People v. Simpson was good for something: potential jurors across the nation have seen that police departments can be incorrigibly ineffective.

34 Id. at 158.

35 Thus, a routine practice of failing to properly preserve DNA evidence would not be relevant to a defendant's case which did not involve DNA evidence.

36 Hollander, supra note 2, at 7 (citing Meyer v. United States, 638 F.2d 155 (10th Cir. 1980)).

37 Meyer, 638 F.2d at 157.

38 Id. at 158.
The rule is, of course, not limited to use as a sword. In a Tenth Circuit case, for instance, defense counsel used the rule to establish his client’s habit and thereby to shield the client. The defendant, who was charged with two counts of conspiracy to distribute heroin, was also charged with possession of a firearm “during and in relation to a drug trafficking crime.” The defendant’s counsel obtained a subpoena duces tecum for the defendant’s arrest records. The records tended to prove that the defendant, who owned a liquor store, habitually carried a firearm to protect the proceeds of his business. This habit evidence was relevant to prove that the defendant was carrying the firearm “in relation to a drug trafficking crime.”

B. Application of the Rule 406 Concept in Virginia

Virginia allows evidence of habit or routine practice, but the case law is “at best confusing and at worst conflicting.” Generally, evidence of personal habits is excluded and evidence of business customs is admitted. Even if the routine practice of a police department could be considered a business practice, specific business practices which have previously been admitted in Virginia courts probably would not apply to police departments, such as: business practices which assist in the interpretation of contracts; course of prior dealing between the parties; and custom in a particular trade. Therefore, counsel, relying on the types of evidentiary arguments underlying Rule 406, will need to aggressively argue for and explain the relevancy of habit evidence to the case.

IV. Character Evidence of Untruthfulness

A. Federal Rule 608(a)

Diminishing the credibility of witnesses who are informants, snitches, police officers, and other persons who instigated the investigation and prosecution of your client is often done through testimony concerning the character of such witnesses. Rule 608(a) allows opinions and reputation evidence of character to impeach witnesses:

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

In a nutshell, defense counsel is allowed to impeach only with evidence that shows an untruthful character. While the operation of the rule is fairly simple, you may be rewarded for using character witnesses creatively. One experienced trial lawyer advocates asking the witness directly what her reputation for truthfulness is. If she answers the question dishonestly, you may call an adverse character witness to contradict her or ask her, under 608(b) about prior bad acts (discussed in the next section). If the witness admits to being known as a liar, so much the better.

Another tactic suggested by the same author is to attempt to discredit a prosecution witness with the hope that the adversary will, in an attempt to rebuild the witness’ credibility, probe for the specific conduct of which is complained. Further character evidence favorable to your client may be placed in front of the jury through the prosecution’s redirect examination, and during such redirect your adversary may “leave the door ajar” for you to use 608(b)(2) to expose further the specific conduct on re-cross examination.

B. Application of the Rule 608(a) Concept in Virginia

In Virginia, character evidence is generally limited to the evidence probative of the witness’ character for truth and veracity. In that sense, Virginia allows no less than the federal rules. Again, unlike the provision in the federal rules, Virginia evidence law allows evidence in support of a witness’ truthfulness only after the witness’ truthfulness has been attacked. Likewise, the rules of relevance and prejudice apply to impeachment character evidence in Virginia just as they do in the federal system. However, unlike in the federal forum where both reputation and opinion evidence is admissible, in Virginia, opinion evidence, “the individual impression of a person formed by one single witness,” is not allowed; only reputation evidence is admissible.

Take note also that Virginia law does not allow a witness to testify to her own reputation for truthfulness. Therefore, you may not ask a witness to testify to her own character in order to impeach that testimony with another character witness unless you are in a federal district court.

brought out during redirect examination. Friend, supra note 14, § 3-14 at 98 (citing 6 Wigmore, Evidence §§ 1897-1899 (1976); McCormick, Evidence § 32 (3d ed. 1984)). More on Rule 608(b) will follow.


50 1 id. § 5-6 at 184 (citing Smith v. Commonwealth, 212 Va. 675, 187 S.E.2d 191 (1972); Redd v. Ingram, 207 Va. 939, 154 S.E.2d 149 (1967)).

51 1 id. § 4-1 at 101 (citing Powell v. Commonwealth, 13 Va. App. 17, 409 S.E.2d 622 (1991)).

52 1 id. § 5-11 at 198 (citing Homestead Fire Ins. Co. v. Ison, 110 Va. 18, 65 S.E. 463 (1909)).

53 1 id. § 5-12 at 199 (citing Burnley v. Commonwealth, 208 Va. 356, 158 S.E.2d 108 (1967)).
V. Specific Instances of Conduct As Character Evidence

A. Federal Rule 608(b)

Sometimes there may be specific instances of misconduct by the prosecution witnesses which you would like to expose for impeachment purposes, perhaps to debunk the basis of knowledge upon which a character witness has formed her opinion of, or determined the community reputation of, another witness. Rule 608(b) provides another impeachment tool by allowing inquiry during cross-examination into specific instances of conduct which are probative of the truthfulness of a witness; the rule, however, specifically prohibits extrinsic proof of such conduct. The rule reads as follows:

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 proved by extrinsic evidence. 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’ character for truthfulness or untruthfulness, or (2) concerning the character for truthfulness or untruthfulness of another witness as to which character the witness being cross-examined has testified.

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’ privilege against self-incrimination when examined with respect to matters which relate only to credibility.54

This rule allows you to inquire into a character witness’ definition of truthful character. It also allows you to ask the character witness whether she has knowledge of specific misconduct by the subject of the inquiry after you describe such misconduct. You would do this in an effort to expose to the jury the witness’ limited scope of knowledge concerning the subject’s character.55 On another note, if your client is testifying, 608(b) provides grounds for objection if the prosecutor attempts to cross-examine the accused about certain crimes which he may have committed, but has not been convicted. The rule specifically allows the accused to retain his right to remain silent when “examined with respect to matters which relate only to credibility.”56

How might you gain admission of extrinsic evidence prohibited under this rule or otherwise get your message across to the jury? Remember that extrinsic evidence excluded under this rule still may be allowed under other theories and rules, so be prepared to respond to objections.57 Aside from extrinsic evidence admission, defense counsel may also refresh the witness’ memory with documents under Rule 612 in an effort to force the truth to light or at least arouse the jury’s suspicions.58

B. Application of the Rule 608(b) Concept in Virginia

In Virginia, specific instances of conduct are not generally allowed to impeach a witness.59 But, as under the federal rule, a character witness’ basis for knowledge may be impeached during cross-examination by inquiring whether the witness knows of a prior bad act of the subject of the character inquiry.60 If the prosecutor attempts to force your client to incriminate herself, object on Fifth Amendment grounds and cite Griffin v. California as authority.61

As to admission of extrinsic evidence in Virginia, if a witness has reason to hope to benefit from her testimony, she may be questioned about her bias. If she denies the bias, she may be impeached with extrinsic evidence of deals she has made for her testimony.62 Also, Virginia allows both oral and written prior inconsistent statements to be introduced as impeachment evidence.63

VI. Character Evidence: Convictions

A. Federal Rule 609

The availability of prior convictions under Rule 609 to impeach the accused often is a major factor in deciding whether the defendant will testify. Defense counsel, however, can also use Rule 609 to force the prosecutor to conduct a similar cost-benefit analysis for each of her witnesses. Rule 609(a) states:

For the purpose of attacking the credibility of a witness, (1) evidence that a witness other than an accused has been convicted of a crime shall be admitted, subject to Rule 403, if the crime was punishable by death or imprisonment in excess of one year under the law under which the witness was convicted, and evidence that an accused has been convicted of such a crime shall be admitted if the court determines that the probative value of admitting this evidence outweighs its prejudicial effect to the accused; and (2) evidence that any witness has been convicted of a crime shall be admitted if it involved dishonesty or false statement, regardless of the punishment.64

However, prior convictions are admissible as are instances of misconduct which tend to prove matters such as motive or intent. 1 id. § 5-1 at 170. See also the discussion of Virginia evidence parallel to Fed. R. Evid. 609 evidence, infra, and Fed. R. Evid. 404(b) evidence, supra.

60 1 Friend, supra note 14, § 5-13 at 204 (citing Zirkle v. Commonwealth, 189 Va. 862, 872, 55 S.E.2d 24, 30 (1949)).

61 See footnote 56 supra.


63 1 Friend, supra note 14, § 4-3, at 119. Additionally, writings may be used to refresh memory. 1 id. § 3-7 at 75.

The rule allows extrinsic evidence of most felony convictions and misdemeanor convictions probative of truthfulness to be admitted. It is no longer required that the evidence be teased out of the witness during cross examination or that a certified copy be admitted at that time. Generally, the conviction must not be more than ten years old, but there are special circumstances in which the judge may admit older convictions.

Resembling Rule 608(b) evidence, evidence excluded by this rule may be admissible under another theory, such as bias or motive. Nevertheless, be prepared for a Rule 403 objection to this evidence under all circumstances.

B. Application of the Rule 609 Concept in Virginia

By statute, Virginia allows evidence of prior felony convictions to be admitted as impeachment evidence. Case law allows witnesses to be impeached with evidence of convictions of misdemeanors involving either moral turpitude or the witness' capacity for veracity. While extrinsic evidence of a conviction is allowed under Fed. R. Evid. 609(a), whether Virginia will allow such evidence is an open question. Evidence of a conviction may be shown through the witness herself. However, if the witness denies the conviction, defense counsel should be able to show, through further questioning, that the witness has "knowingly testified untruthfully about a material fact" — a basis of impeachment separate from conviction of a crime. If the witness continues to testify falsely, a good argument can be made that fairness requires that extrinsic evidence of the conviction be admitted to show the false testimony.

It should be noted that Virginia law gives slightly more protection to an accused than to other witnesses. An accused may be impeached by prior convictions, but unlike other witnesses who may be asked the names of the felonies of which they have been convicted, except in the case of perjury, an accused may be asked only the number of felonies she has committed.

VII. Holding The Government To Its Word

A. Federal Rule 801(d)(2)

If the prosecutor contends that your client has no standing to object to the admission of a particular piece of evidence, you may be able to establish an admission that your client did not possess the evidence. In drug cases, or cases in which a crucial piece of evidence is subject to a suppression motion, hold the prosecutor to her words by using Rule 801(d)(2).

Admission by party opponent. The statement is offered against a party and is (A) the party's own statement, in either an individual or representative capacity or (B) a statement of 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 the agency or employment, made during the existence of the relationship, or (E) a statement by a coconspirator of a party during the course and in furtherance of the conspiracy.

65 The rule's advisory committee notes, 56 F.R.D. 183, 270, indicate that the test for whether any particular crime is a felony is whether the defendant in that case was subject to imprisonment in excess of one year.

66 A conviction obtained in violation of the Sixth Amendment cannot be used to impeach a defendant. 20 Michie's Jurisprudence of Virginia and West Virginia 681 (A.D. Kowalsky, et. al., eds., 1993) (citing United States v. Dorman, 496 F.2d 438 (4th Cir.), cert. denied, 419 U.S. 945 (1974)).

67 Daniels, supra note 46, at 8.

68 Fed. R. Evid. 609(b). Defense counsel may argue that the witness has not been rehabilitated since her crime, and therefore, commission of the crime is probative of her character.

69 Daniels, supra note 46, at 8.

70 1 Friend, supra note 14, § 4-2 at 106 (citing among case law Va. Code Ann. § 19.2-269 (1995) ("the fact of conviction may be shown in evidence to affect [the witness'] credit")). See also 20 Michie's Jur, supra note 66, § 66 at 675.

71 1 Friend, supra note 14, at 108 (citing among others Johnson v. Commonwealth, 224 Va. 525, 298 S.E.2d 99 (1982)). Cases exist which state that a felony conviction used to impeach must be one involving moral turpitude, but the express intent of Va. Code Ann. § 19.2-269 seems quite contrary.

72 20 Michie's Jur, supra note 66, § 66 at 679.

73 1 Friend, supra note 14, at 108 (citing among others McLane v. Commonwealth, 202 Va. 197, 116 S.E.2d 274 (1960); Harold v. Commonwealth, 147 Va. 617, 136 S.E. 658 (1926)).

74 1 Friend, supra note 66, § 66 at 678 (citing Smith v. Commonwealth, 155 Va. 1111, 156 S.E. 577 (1931)). If a conviction has not yet been obtained, but a plea agreement exists between the witness and the Commonwealth, the details of the plea agreement may be entered into evidence if a cautionary instruction is given to the jury. 20 id. at 680 (1993 & Supp. 1995) (citing Shanklin v. Commonwealth, 222 Va. 862, 284 S.E.2d 611 (1981)).
The government frequently uses this rule to admit a defendant’s or coconspirator’s statement. Because the government has been deemed to be a party-opponent of the defendant in criminal proceedings, the rule may be used by the defense as well.

The rule allows a statement offered for proof of the matter asserted to be admitted if the statement is: offered against a party and either is a) a party’s own statement; b) a statement of which the party has manifested an adoption or belief in its truth; or c) a statement of the party’s agent or servant concerning a matter within the scope of the agency or employment. The Fourth Circuit has held that a statement is binding on the government if it is clear and unambiguous admission. A statement made to obtain a search warrant, for example, is adopted by the government and may be introduced against the government under Rule 801(d)(2).

Other exculpatory evidence may be found in the admissions of the government. Bills of particulars are an excellent source of admissions. Confidence in the justice system depends upon the courts holding the government to its bill unless an explanation for variance therefrom is accepted by the court. A fundamental change in the prosecution’s version of the facts must be explained or it cannot be concealed from the trier of fact. Admissions during pre-trial proceedings are also relevant.

Even in the appellate process, admissions are important. The government may lose its right to challenge the standing of the defendant on appeal because it adopted an inconsistent position on the issue at trial. However, the government does not vouch for the credibility of each statement it introduces. Therefore, not all statements of prosecution witnesses will be admissions of the government.

Other potential sources of admissions by the government include: pretrial motions, argument, other related cases, an informant’s credibility with the prosecution, transcripts of an informant’s pleas and sentencing hearings, statements by prosecutors about experts, and admissions of the non-lawyer agents of the government (such as police officers, customs officials, IRS agents, professional chemists, fingerprint experts, and accountants) in yours or other cases. Attorneys should keep files of testimony and statements made by these lay people for future reference. During trial, counsel should keep notes on statements which possibly may be used on appeal.

B. Application of the Rule 801(d)(2) Concept in Virginia

Generally, Virginia evidence law allows admissions by party-opponents to be admitted into evidence. Whether admissions by government attorneys are admissible against the government in criminal cases in Virginia appears to be an open question.

Party admissions made by those with express or implied authority to speak on behalf of a party may be admissible, and government attorneys are no doubt agents of the government. The Virginia test for determining whether an agent’s statement may be held against the principal includes whether the agent was acting within the scope of the agent’s employment and whether the agent had authority to make statements on behalf of the principal. Additionally, attorneys’ “judicial admissions” generally are admissible against their clients, and their extra-judicial admissions are not. As the government is effectively the government attorney’s “client,” statements made in court by government attorneys should be admissible against other government attorneys.

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80 Hollander, supra note 2, at 8 (citing United States v. Morgan, 581 F.2d 933, 937 n. 10 (D.C. Cir. 1978)) (after the government has filed a sworn affidavit that it believes particular statements are trustworthy, it cannot then object on hearsay grounds to admission of the affidavit).

81 Id. (citing McCormick on Evidence, 447-70 (4th ed. 1992)). The rule classifies such statements as “not hearsay,” but in reality the rule is merely excepting old fashioned hearsay statements from exclusion under the hearsay rule because of the reliability of the particular class of hearsay to which they belong.

82 Id. (citing United States v. Blood, 806 F.2d 1218, 1221 (4th Cir. 1986)). The Blood court held that the inadvertent use of the word “insurance” in the government’s opening statement and in the proposed voir dire questions were not admissions that the plan at issue was not an ERISA plan and therefore, dismissal of the ERISA criminal charges was not required. Given that the Virginia courts often adopt the Fourth Circuit’s case law, chances are that this is the test in Virginia.

83 Id. (citing United States v. Ramirez, 894 F.2d 565, 570 (2d Cir. 1990)). The court did not decide this issue because it found the admission to be nonprejudicial. However, the court cited United States v. Morgan, 581 F.2d 933, 937-38 (D.C. Cir. 1978) as support for admission of the admission.

84 Hollander, supra note 2, at 8 (citing United States v. Kattar, 840 F.2d 118 (1st Cir. 1988)). The government’s briefs from prosecution of the Church of Scientology were admissible during the trial of a defendant charged with extortion from the church because the prosecution portrayed the church as “virtuous”; see also United States v. Powers, 467 F.2d 1089, 1097 n.1 (7th Cir. 1972)(Stevens, J., dissenting))(Stevens wrote a powerful dissent as the Court ruled that no error was committed when the government’s previous successful prosecution of a co-defendant was ruled inadmissible although it was obtained by maintaining that the co-defendant received the whole of two checks for which Powers was subsequently charged with obtaining the whole of by mail fraud.) Evidence such as this may be discoverable pre-trial under Brady and Kyles, supra note 33.

85 Hollander, supra note 2, at 8 (citing United States v. GAF Corp., 928 F.2d 1253 (2d Cir. 1991)). The GAF Corp. court held that initial bill of particulars can be admitted as an admission of the government especially when the government’s rebuttal summation labels beliefs stated in the bill as smoke screens created by the defendant.

86 Id. (citing United States v. Van Griffin, 874 F.2d 634, 638 (9th Cir. 1989)) (proof of the measures necessary for a reliable nystagmus test for drunkenness may be shown by admission of a government manual which is relevant to the particular branch of the government and is competent evidence).

87 Id. (citing United States v. Morales, 737 F.2d 761, 763 (8th Cir. 1984)) (the government shall not argue constructive possession at trial and lack of standing to challenge the search on appeal. The court did not speak of admissions, but of the lack of a government “right” to change positions on appeal.). See also Hollander, supra note 2, at 8 (citing among others Steagald v. United States, 451 U.S. 204 (1981)).


90 Ronald J. Bacigal & Thomas F. Guernsey, Admissibility of Evidence in Virginia 4 (1990) (citing Tyree v. Lariew, 208 Va. 382, 385, 18 S.E.2d 140, 143 (1967)).

91 Id. at 8 (citing Eller v. Blackwelder, 204 Va. 292, 295, 130 S.E.2d 426, 428 (1963)).

92 2 Friend, supra note 14, § 18-37 at 220.

93 1 id. § 18-39 at 224.

94 Id. (Supp. 1995) (citing among others Hall v. Commonwealth, 16 Va. 779, 433 S.E.2d 489 (1993)). The court held that the defendant’s claim at the suppression hearing of a possessor interest in the contraband was admissible against him at trial.
Likewise, factual statements in pleadings and in suppression hearings may be used to impeach a party. In addition, admissions of fact in final pleadings (pleadings upon which the case goes to trial), and evidential admissions in pleadings which are withdrawn or otherwise amended also generally are admissible against the parties for whom the attorney acted. Whether these rules of evidence are equally applicable against Commonwealth attorneys is an open question.

VIII. Impeaching The Most Vulnerable Witnesses: Declarants Who Do Not Appear At Trial

A. Federal Rule 806

Suppose the prosecutor has just finished direct examination of a witness who testified to admissible hearsay. Besides attacking the veracity of the witness, how might defense counsel discredit the testimony? Hearsay declarants are witnesses as much as those witnesses who do appear, and, therefore, can be impeached with prior or subsequent inconsistent statements. Defense counsel may also impeach any witness by showing evidence which contradicts part of the witness’ testimony. Such evidence is particularly helpful if the judge grants an instruction allowing the jury to use the giving of false testimony as a factor when weighing the credibility of the witness’ entire statement.

If at all possible, Rule 806 must be used to attack declarants who do not appear at trial. The rule reads as follows:

When a hearsay statement, or a statement defined in the Rule 801(d)(2), (C), (D), or (E), has been admitted in evidence, the credibility of the declarant may be attacked, and if attacked may be supported, by any evidence which would be admissible for those purposes if declarant had testified as a witness. Evidence of a statement or conduct by the declarant at any time, inconsistent with the declarant’s hearsay statement, is not subject to any requirement that the declarant may have been afforded an opportunity to deny or explain. If the party

against whom a hearsay statement has been admitted calls the declarant as a witness, the party is entitled to examine the declarant on the statement as if under cross-examination.

The reason for the rule is fairness to the party against whom the declarant’s hearsay evidence is admitted: the impeaching party has already been denied cross-examination by the declarant’s unavailability; therefore, that party should at least have the benefit of impeachment. The windfall to the impeaching party is that such declarants are not available to defend their inconsistent statements or actions.

Under Rule 806, the court may admit almost any prior or subsequent inconsistent statement to impeach the declarant. The rule states explicitly that admissibility does not depend upon whether “the declarant may previously have been afforded an opportunity to deny or explain.”

Be creative and examine all of your options. For instance, a witness’ demeanor during prior written testimony (as well as any statement he made regarding such testimony) may be admitted for impeachment purposes. Of course, an absent child’s testimony can be impeached on numerous grounds including incompetency to testify.

B. Application of the Rule 806 Concept in Virginia

When impeaching out-of-court declarants in Virginia, remember that witnesses can be impeached with forms of evidence which contradict present testimony. Forms of inconsistent evidence admissible in Virginia are prior testimony, prior inconsistent statements, prior inconsistent conduct, written statements, transcripts, depositions, and interrogatories. Virginia evidence law is unsettled as to whether one can impeach with subsequent inconsistent statements or actions.

Prior inconsistent statements may be used to impeach whether they are written or oral and whether the testimony was taken in open court or by the introduction of a deposition. Prior inconsistent conduct is available for impeachment under the same rules which apply to prior inconsistent statements.

95 1 id. § 18-47 at 243-44.
96 Daniels, supra note 46, at 8. However, the admission of extrinsic evidence on a collateral matter (i.e., not the issue of guilt or punishment) is limited by case law. Id. The 1991 edition of Weistin’s Evidence at pages 607-79 suggests that a Fed. R. Evid. 403 analysis is helpful in assessing the admissibility of evidence on a collateral matter. Id.
98 Hollander, supra note 2, at 9 (citing United States v. Hale, 422 U.S. 171, 176 (1975)). Although not directly on point because it deals with the inadmissibility of post-arrest silence as a “statement” inconsistent with an affirmative defense, this case nonetheless stands for the proposition stated in the above text. On another note, to examine the rationale of pre-federal rules cases regarding admission of subsequent inconsistent statements, see People v. Rosoto, 373 P.2d 867 (Cal. 1962), modified on other grounds, 401 P.2d 220 (Cal. 1965); People v. Culp, 167 P.2d 714 (Cal. 1946) (which both upheld the admissibility of subsequent statements) and see Mattax v. United States, 156 U.S. 237 (1895) and People v. Hines, 29 N.E.2d 483 (N.Y. 1940), overruled on other grounds, 282 N.E.2d 312 (N.Y. 1972) (which both struck down such admissibility.) Id. For the rule regarding admission of prior inconsistent testimony as substantive evidence see Fed. R. Evid. 613(b) and Fed. R. Evid. 801(d)(1)(A).
99 As one authority has suggested, if a witness is available for that purpose, there is no requirement that she be allowed to explain or deny at trial; if a witness becomes available to testify after she has been impeached, it is questionable whether she was in fact unavailable in the first place, and fairness would dictate that she not be allowed to testify for the limited purpose of explaining away her shortfalls.

100 Hollander, supra note 2, at 9 (citing People v. Rosoto, 373 P.2d 867, 885 (Cal. 1962) modified on other grounds, 401 P.2d 220 (Cal. 1965); defense called court reporter to state that the (now deceased) witness "shook visibly while testifying" and told her that he had to testify that way under threat of death; ruled proper impeachment with prior testimony.)
102 See also id. at 124 for rules regarding admission of prior inconsistent testimony as substantive evidence.
103 Virginia law requires that if prior testimony is to be admitted against a party in the present action, she must have been a party in the former trial. Additionally, the issues must be substantially the same in both trials. 2 id. § 18-10, at 116-119.
104 1 Friend, supra note 13, § 4-3, at 119.
105 Id. But see Va. Code § 19.2-270 (1995). Id. The statute states, "[i]n a criminal prosecution, other than for perjury, or in an action on a penal statute, evidence shall not be given against the accused of any statement made by him as a witness upon a legal examination, in a criminal or civil action, unless such statement was made when examined as a witness in his own behalf."
106 1 id. at 121.
The Virginia procedure for introducing evidence may limit the availability of the Rule 806 concept in state courts. Impeachment by written statement requires that the witness' attention be drawn to the time the statement was made and that she be asked whether she made the writing.\(^{107}\) This procedure arguably would seem to preclude the use of impeachment by written statement for hearsay evidence as the declarant herself could not be alerted to the statement and the witness relaying the hearsay testimony would have no response. It may be, however, that Virginia courts have not yet anticipated such a situation, and that, out of fairness, the courts would adopt a Rule 806 approach.

In Virginia, it is possible that an unavailable declarrant will have made one of the following admissible hearsay statements to which the Rule 806 concept might apply: dying declarations, and declarations against interest;\(^{108}\) and excited utterances, pleas of guilty or nolo contendere resulting in convictions, present sense impressions, recent complaints in sexual assault actions, recorded recollections, statements concerning personal or family relationships, statements for purposes of medical diagnosis or treatment, then existing mental or emotional conditions, and then existing physical conditions. A witness may be called to testify to such declarations as all are exceptions to the hearsay rule in Virginia. Defense counsel may wish to consider ways to use the concept of Federal Rule 806 when confronted with such testimony in Virginia courts.

IX. Suppressing Non-probative And Prejudicial Course Of Investigation Evidence

Prosecutors and police often attempt to provide the jury with testimony concerning the investigation of your client. Frequently, such testimony is very prejudicial, yet it is irrelevant, hearsay, or excludable under Rule 403.

Many facts learned during the investigation are not probative of guilt or innocence, and testimony concerning them simply arouses the jury’s emotions. Information received by radio dispatch or 911 calls is commonly elicited by prosecutors to show the officer’s reasons for suspecting your client or their reason for going to a certain location. The Third Circuit\(^{109}\) held that, in light of the officers’ sighting and pursuit of the defendant at the scene, it was not necessary for the officers to explain that they went to the scene because of a radio dispatch and a 911 call which described a black man dressed in black carrying a gun.\(^{110}\) Similarly, the reasons why postal inspectors began an investigation had no probative value according to the court in United States v. Lambery.\(^{111}\) In Lambery, the agents testified that they planted a package at the post office because they had received information that the defendant had been stealing packages which were sent to that office by mistake. The court held the admission of this testimony reversible error.\(^{112}\)

Communications such as those described above also contain a good deal of excludable hearsay. The Third Circuit found that although a 911 tape itself could be introduced through the business records exception to Rule 803, the description on the tape of the defendant was excludable hearsay because the 911 caller did not appear at trial.\(^{113}\) The catch phrase “hearsay within hearsay” is used to describe such a situation. The court held that widespread abuse of such evidence places upon courts a duty to determine “whether the ostensible hearsay purpose is valid.”\(^{114}\) In a Second Circuit case,\(^{115}\) the testimony of a customs agent that two individuals had implicated the defendant in the crime of conspiracy to import narcotics was ruled inadmissible.\(^{116}\) The agent also testified to information relayed to her by another witness about the meaning of certain writing on a matchbook.\(^{117}\) The court condemned the use of investigation evidence in this way unless non-controversial issues are discussed or when allegations by a defendant must be rebutted.\(^{118}\) The court strongly suggested that prosecutors should make a proffer of hearsay evidence before trial if problems of this magnitude are anticipated.\(^{119}\)

Defense counsel is advised to anticipate objectionable testimony when the prosecution asks an officer why he went to the scene, whether he pursued the defendant after speaking with any other witness, or whether he believed that "someone" was involved in criminal activity after speaking with another witness.\(^{120}\)

This article has presented a sampler of ways in which the concepts behind the Federal Rules of Evidence may be used in Virginia state courts. I encourage the reader to use these concepts to develop unconventional ways of applying Virginia evidence law and thereby participate in the evolution of that law.

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\(^{108}\) Declarations against interest can be admissible hearsay in Virginia only if the declarant is unavailable to testify. 2 id. § 18-12 at 127 (1993 & Supp. 1995) (citing among others Yellow Cab Co. v. Eden, 178 Va. 325, 16 S.E.2d 625 (1941); Eppes v. Eppes, 169 Va. 778, 195 S.E. 694 (1938)).

\(^{109}\) Bergman, supra note 89, at supp. 1 (citing United States v. Sallins, 993 F.2d 344 (3d Cir. 1993)).

\(^{110}\) Id. Furthermore, the contents of both communications was hearsay, as will be discussed below.

\(^{111}\) 778 F.2d 59, 61 (1st Cir. 1985). Id. See also United States v. Taylor, 900 F.2d 779 (1990) (reason for beginning the investigation had no relevance and was highly prejudicial). Id.

\(^{112}\) Id. (citing Lambery, 778 F.2d at 61).

\(^{113}\) Sallins, 993 F.2d at 347. See also Zeno v. State, 646 A.2d 1050 (Md. 1994) (testimony that an informant had apprised the officer of the defendant’s guilt was inadmissible hearsay and its admission violated the confrontation clause).

\(^{114}\) Sallins, 993 F.2d at 346. The court cited United States v. Bettlejoun, 892 F.2d 744, 746 (8th Cir. 1989) for the proposition that the absence of a non-hearsay purpose establishes that the evidence was used to prove the truth of the matter asserted. 993 F.2d at 347.

\(^{115}\) Bergman, supra note 89, at supp. 2 (citing United States v. Reyes, 18 F.3d 65, 70 (2d Cir. 1994)).

\(^{116}\) Reyes, 18 F.3d at 67.

\(^{117}\) Id. at 68.

\(^{118}\) Id. at 71. The Reyes opinion explains very well the difference between admissible and nonadmissible state of mind evidence.

\(^{119}\) Bergman, supra note 89, at supp. 2 (citing Reyes, 18 F.3d at 72).

\(^{120}\) Id.