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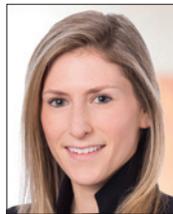
The Admissibility of Co-Conspirator Statements Revisited

As determined court administrators reopen courtrooms retrofitted for COVID-era jury trials, a growing backlog of complex criminal trials are starting to move forward. Despite all of the changes to the physical layout of courtrooms hosting these trials, one feature of many of these trials will seem quite familiar—the government’s reliance on co-conspirator statements to win cases. Whether the charges at issue involve allegations of CARES Act fraud, insider trading, securities fraud, public corruption, or narcotics trafficking, prosecutors will likely continue to make their cases on the backs of witnesses who never step foot in the courtroom.

Co-conspirator statements, whether introduced at trial by cooperating witnesses or through agents testifying about emails and texts, are admissible because they are not considered hearsay evidence under Rule 801(d)(2)(E). To the dismay of the defense, this evidence is often presented under circumstances where defendants cannot



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challenge its integrity or meaning since no witness with first-hand knowledge of the statement appears in court.

The exemption for co-conspirator statements has taken on greater significance as individuals have steadily increased their use of email, texts and social media to communicate.

This article examines the origination, evolution, and practical application of this key evidentiary rule, and considers options available to defense lawyers seeking exclusion.

History of 801(d)(2)(E)

The co-conspirator hearsay exemption is grounded in principles of agency and partnership law. *United States v. Bucaro*, 801 F.2d 1230, 1232 (10th

Cir. 1986). It has existed in common law since as early as 1791. *See Patton v. Freeman*, 1 N. J.L. 113 (1791).

In 1827, the Supreme Court acknowledged this evidentiary rule in a case involving a defendant accused of violating the Slave Trading Act by knowingly dispatching a ship to procure Africans and sell them in Cuba. *United States v. Gooding*, 25 U.S. 460 (1827). The government sought to introduce damning conversations between two members of the ship’s crew who discussed the slave-trading operation and payment plans. Over defendant’s objection, the statements were admitted under principles of agency, and upheld as “competent evidence against the defendant.” *Id.* at 479. It wasn’t until 1975 that this hearsay exemption was codified. *See* 1975 U.S. Code Cong. and Adm. News, p. 1092.

In 1980, the Supreme Court outlined what prosecutors must prove to introduce co-conspirators statements. *Bourjaily v. United States*, 448 U.S. 56, 175 (1980). Prosecutors have the burden of proving by a *preponderance of evidence* that (1) a conspiracy existed; (2) the defendants

and declarants were members of that particular conspiracy; and (3) the statements were made during and in furtherance of the conspiracy, for the statement to be admissible under FRE 801(d)(2)(E). Whether the prosecution has met its burden is a preliminary decision made by the judge under FRE 104(a). *Id.* In *Bourjaily*, the prosecution introduced at trial recordings of conversations between a co-conspirator and informant. The Court held that the Sixth Amendment does not require a court to inquire into the statement's indicia of reliability for admission under 801(d)(2)(E). *Id.* at 183–84.

In *United States v. Inadi*, 475 U.S. 387 (1986), the Court further explained that the co-conspirator exemption applies to statements with “independent evidentiary significance” and prosecutors need not call the declarant as a witness or demonstrate her unavailability to testify.

Defendants have argued the use of co-conspirator statements undermines their Sixth Amendment right to cross-examine the declarant. However, the Supreme Court, in *Crawford v. Washington*, 541 U.S. 36, 56 (2004) clarified that co-conspirator statements that fall under 801(d)(2)(E) are “non-testimonial” because they are made in furtherance of a conspiracy, and are admissible despite a defendant's Sixth Amendment right to confront witnesses. *Id.* at *56.

Wide Latitude Favorable To the Prosecution

Federal courts have generally given prosecutors wide latitude to rely on co-conspirator statements.

First, regarding the threshold question of whether a conspiracy existed, the government need not prove a conspiracy by direct evidence. “The existence of a conspiracy may be inferred from circumstantial evidence.” *United States v. Bucaro*, 801 F.2d 1230, 1232 (10th Cir. 1986).

Second, the exemption also applies even where no party has been formally charged with a conspiracy. *United States v. Washington*, 434 F.3d 7 (1st Cir. 2006).

Third, a court may consider the proffered statement as evidence that a conspiracy existed and the defendant participated in it. *See Bourjaily*, 483 U.S. at 180. However, case law across circuits has held that while a court *may* consider the proffered statement itself in determining the existence of a conspiracy, and a defendant's participation in it, such statements are presumptively unreliable; thus, for such a statement to be admissible, some independent corroboration is required. *See, e.g., United States v. El-Mezain*, 664 F.3d 467, 502 (5th Cir. 2011); *United States v. Diaz*, 176 F.3d 52, 83 (2d Cir.1999); *United States v. Clark*, 18 F.3d 1337, 1341–42 (6th Cir. 1994).

Because of the nature of the evidence generally uncovered to prove criminal conspiracies, “wide latitude is allowed [to the prosecution] in presenting evidence, and it is within the discretion of the trial court to admit evidence which even remotely tends to establish the conspiracy charged.” *Nye & Nissen v. United States*, 168 F.2d 846, 857 (9th Cir. 1948), *aff'd*, 336 U.S. 613 (1949).

Fourth, the requirement that a statement be made “during and in

furtherance” a conspiracy is broad, and includes more than operative statements. *United States v. Garcia-Torres*, 280 F.3d 1, 5 (1st Cir. 2002)

Finally, in deciding whether co-conspirator statements were made “during the course of and in furtherance of the conspiracy,” a court can consider circumstantial evidence, including the content of the document(s), the location in which they were found, handwriting, and conformity of information in the document(s) with information otherwise in evidence. *See, e.g., United States v. DeLuna*, 763 F.2d 897, 909 (8th Cir. 1985).

Co-Conspirator Statements

The exemption for co-conspirator statements has taken on greater significance as individuals have steadily increased their use of email, texts and social media to communicate. Electronic communications can be a problematic source of evidence when they are introduced with limited certainty about the circumstances under which the communications occurred and the author's intent.

Nonetheless, contemporaneous electronic communications, like emails, are considered “statements” within the meaning of FRE 801(a). In *United States v. Kandhai*, 629 F. App'x 850 (11th Cir. 2015), emails between an alleged co-conspirator and confidential informant were held admissible at defendant's trial for conspiracy to distribute cocaine as statements by a co-conspirator during and in furtherance of the conspiracy.

Text messages are treated the same as emails. In *United States v. De La Torre*, 907 F.3d 581 (8th Cir. 2018), the

U.S. Court of Appeals for the Eighth Circuit affirmed the admission of texts as non-hearsay under 801(d)(2)(E). *See also United States v. Torres*, 742 F. App'x. 244, 245 (9th Cir. 2018) (holding the district court erred in granting defendant's motion *in limine*, which excluded texts between defendant and an alleged co-conspirator); *United States v. Cannon*, 740 F. App'x 785, 789 (4th Cir. 2018) (co-conspirator's texts admissible under 801(d)(2)(E)).

Computer records can also fall within this rule. For example, in *United States v. Moran*, 493 F.3d 1002, 1010–11 (9th Cir. 2007), a tax fraud case, financial records used to keep track of complex financial transactions that served to keep the alleged co-conspirators apprised of the ongoing conspiracy, and which were recovered from a co-defendant's computer, were admissible under 801(d)(2)(E). The Ninth Circuit, in upholding the admission of the records, cited the district court's pro-prosecution observation that "in any conspiracy that involves complex financial transactions, it is in furtherance of the conspiracy to maintain a record of those transactions." *Id.* at 1011.

It is easy to see the landmine that these instantaneous communications can create, particularly where social media posts, emails, or texts could be made in jest, and where the government need not call the declarant to admit the statement.

Defenses

While each case is unique, some of the general defenses available to the admission of co-conspirator statements include:

- No conspiracy existed
- The statement was not made *in furtherance* of the conspiracy
- The statement was not made *during* the course of the conspiracy
- Attack on the credibility of the declarant
- Lack of authentication—*g.*, when there is reason to believe the author of an email has a pattern of doctoring email chains or the document was forged
- Admission of the statement will cause unfair prejudice under FRE 403

Defendants should first consider whether the government can prove the defendant participated in a conspiracy. If a co-conspirator's statement is the *only* evidence of the conspiracy, then a defendant's objection to the statement's admission should prevail. *See, e.g., United States v. Al-Moayad*, 545 F.3d 139, 173–74 (2d Cir. 2008).

Defendants can also argue the statements proffered were not made in furtherance of a conspiracy. "Statements which tend to frustrate or hinder the goals of the conspiracy, or those which cannot conceivably be interpreted to advance the accomplishment of conspiracy objectives, cannot reasonably be interpreted to further that conspiracy." *United States v. Saneaux*, 365 F. Supp. 2d 493, 501 (S.D.N.Y. 2005). "Statements made for personal objectives outside the conspiracy or as part of idle conversation are not admissible under Rule 801d(2)(E)." *Moran*, 493 F.3d at 1010.

Additionally, statements made after a conspiracy has concluded are likely inadmissible as they are not made in "furtherance" of the conspiracy. *See,*

e.g., United States v. Reyes-Garcia, 798 F. App'x 346, 359 (11th Cir. 2019).

Defendants can also seek to impeach the credibility of an alleged co-conspirator declarant. Under FRE 806, regardless of the declarant's availability, the declarant's credibility may be attacked with "any impeachment evidence that would have been admissible had the declarant testified." *United States v. Uvino*, 590 F. Supp. 2d 372, 374 (E.D.N.Y. 2008). Similarly, a co-conspirator testifying for the government may be receiving financial or other benefits that may be fodder for cross-examination, or even a *Brady* motion if not properly disclosed to the defense.

Finally, a defendant may also consider arguing that a statement would be unduly prejudicial under FRE 403. *See, e.g., United States v. Ferguson*, 246 F.R.D. 107, 119 (D. Conn. 2007).

Conclusion

As jury trials resume, prosecutors will no doubt continue to rely heavily on co-conspirator statements to make their cases. Defense counsel must be alert to the possibility that there exist options for excluding or attacking the credibility of these statements.