Supervised Practice Portfolio Examination (SPPE)

Sample Redacted Written Work Product

This document includes two examples of written work product that has been redacted for submission to BBX as part of the Supervised Practice Portfolio Examination (SPPE). These examples are based on hypothetical clients and hypothetical matters. We are thankful to Professor Joanna Perini-Abbott, Director of the Center for Advocacy at Lewis & Clark Law School, for these examples.

SAMPLE ONE
PORTION OF A MEMORANDUM
IN SUPPORT OF A TRIAL MOTION
(United States District Court)

I. The Government moves to include evidence of [the Employee-Defendant's] note-taking habits and the missing notebooks from 2010 as evidence of his consciousness of guilt.

The fact that [the Employee-Defendant] maintained notebooks for his entire adult life with the exception of the relevant time period of insider trading is critical evidence of [the Employee-Defendant's] consciousness of guilt. The evidence of the missing notebooks strongly suggests that [the Employee-Defendant] destroyed the two notebooks from the relevant time period upon learning of the investigation. This evidence is relevant under Federal Rule of Evidence 401 because it is effectively an admission by conduct and thus makes it more likely than without this evidence that [the Employee-Defendant] and [the Company-Defendant] are guilty. The evidence bears no risk of unfair prejudice, let alone sufficient unfair prejudice to substantially outweigh the probative value, so Rule 403 should not exclude this evidence. This evidence also meets all four prongs of the test set forth in *United States v. Myers* to demonstrate consciousness of guilt. 550 F.3d 1036 (5th Cir. 1978).

A. [Employee-Defendant], who was on notice of the investigation, destroyed notebooks from the relevant time period that likely contained evidence of wrongdoing.

[Employee-Defendant] and his employer, [Company-Defendant], have been charged with insider trading. [Employee-Defendant] is a meticulous notetaker. As evident from the notes he took on May 2, 2002, [Employee-Defendant] wrote down everything from what he ate for lunch to information learned in business meetings and his planned stock trades. When the FBI executed a search warrant of his office in late 2012, they found daily notes dating back to his college days.

The FBI found sequential notebooks that outlined his activities and meetings every day from college to the present with two notable exceptions. The only missing time periods were January-March 2010 and July-October 2010. [Employee-Defendant's] best friend, [Name] will testify that [Employee-Defendant] is "neurotic about writing everything down" and that "it is actually a point of pride for [Employee-Defendant] that he can go back and tell you what happened on a random day in May 2002." Prior to the search by law enforcement, [Employee-Defendant's] employer notified him that [Company-Defendant] was being investigated for insider trading and that he should maintain all records from 2011 through 2013 (meaning ongoing). Although the preservation notice did not cover 2010, [Employee-Defendant] was on notice that the company was being investigated for insider trading that took place in 2010.

B. [Employee-Defendant's] deceitful conduct meets the standard for consciousness of guilt set forth in *Meyers*, is relevant under FRE 401, and there is no risk of unfair prejudice.

Applying the four-part test set forth in *Meyers*, this evidence meets each prong necessary to show consciousness of guilt. As a preliminary matter, the test in *Meyers* is one of conditional relevance, meaning Federal Rule of Evidence 104(b) applies. All that is required under Rule 104(b) is that there is evidence sufficient to support a finding that the fact in question exists. Here, the evidence of consciousness of guilt (in the form of destruction of evidence) is akin to that in *Meyers*, which analyzed evidence of a different type of consciousness of guilt (flight) by explaining the chain of inferences that must be satisfied in order for the defendant's behavior to be relevant: (1) the defendant's behavior was indeed flight; (2) the flight was due to consciousness of guilt; (3) the defendant's consciousness of guilt concerned the instant offence; and therefore (4) it is more likely that the defendant is actually guilty of this crime.

Even if the Court were to apply the *Myers* framework to *all* evidence of consciousness of guilt (as opposed to limiting it to evidence of flight), there is evidence is that [Employee-Defendant] took and kept notes every day of his life from college to the present. The only missing notebooks are from the time of the alleged insider trading. This is evidence sufficient to support a finding of destruction of the relevant notebooks. Further, before the search of [Employee-Defendant's] office, he was on notice of an investigation of insider trading in 2010. The only notebooks missing are those from 2010. It is also clear from his notes on May 3, 2002, that [Employee-Defendant] did write down information about stock tips and anticipated stock trades. Thus, it is likely that, if preserved, his notebooks would have evidence of his intent to commit insider trading. This evidence is sufficient to support a finding of consciousness of guilt and consciousness of guilt of *this* crime. Finally, all this evidence adds up to sufficient evidence to support an inference that [Employee-Defendant] destroyed the notebooks because he is actually guilty of this crime.

The evidence that [Employee-Defendant] took and maintained meticulous notes every day of his life except for several month in the heart of the relevant time period is relevant to [Employee-Defendant's] mindset and consciousness of guilt. It is admissible under Rules 401 and 402 and there is no articulable unfair prejudice that would substantially outweigh probative value under Rule 403.

SAMPLE TWO
PORTION OF A MEMORANDUM
IN SUPPORT OF A TRIAL MOTION
(United States District Court)

I. [Defendant] moves to exclude three irrelevant and highly prejudicial photographs.

During a raid of his home, trailer, and classroom the Government took three irrelevant photographs belonging to [Defendant]: (1) a satirical photograph of [Defendant] superimposed on Tony Soprano; (2) a photograph of [Defendant] and his former student sharing a beer after they completed home renovations; and (3) a photograph of [Defendant's] chemistry class conducting an experiment. None of the photographs have any relevance to the crime with which [Defendant] is charged: manufacturing methamphetamine. As such they simply should not be admitted under Rules 401 and 402. Further, each photograph carries the risk of significant unfair prejudice and should therefore be excluded under Rule 403.

A. The photograph of [Defendant] with Tony Soprano is merely satire and has no connection to the charges in this case.

As law enforcement found, [Defendant] had a satirical photograph of himself superimposed on a photograph of Tony Soprano. This photograph reveals nothing about whether [Defendant] did or did not manufacture methamphetamine. Notably, while Tony Soprano was known as a "crime boss" he was not regularly associated with narcotics, and certainly not methamphetamine. Further, it was not found near the purported ingredients for methamphetamine in [Defendant's] basement nor was it found in the trailer were the Government claims it found equipment used for manufacturing meth. There is nothing about methamphetamine in the photograph. The photograph does nothing to make it more or less likely that [Defendant] manufactured meth. As such, it should be excluded under Rules 401 and 402.

While the probative value is non-existent, the risk of unfair prejudice is high. Jurors who have seen the show *the Sopranos* may mistakenly assume that [Defendant] wishes to emulate the negative traits associated with Tony Soprano. Given the minimal probative value, the risk of unfair prejudice substantially outweighs the probative value and the evidence should be excluded under Rule 403.

B. The photograph of [Defendant] and his former student is not relevant to the charges and carries the risk of unfair prejudice because the jury may assume [Defendant] has inappropriate relationships with students.

When law enforcement raided [Defendant's] trailer, they found a photograph of [Defendant] and his former student [Name]. There is nothing nefarious or inappropriate occurring in the photograph. There are no drugs in the photograph. Rather, [Defendant] and [the former student] are sitting together wearing equipment regularly worn for fumigating. Nothing about this photograph makes it more or less likely that [Defendant] manufactured meth. As such, this photograph is not relevant and should be excluded under Rule 402. To the extent the Government intends to suggest that [Defendant] and [the former student's] fumigation gear is indicative of manufacturing meth, no such evidence is readily apparent from the photograph and defense is unaware of any such evidence. As such the Government cannot prove the necessary underlying fact that would make this evidence relevant. Fed. R. Evid. 104(b).

While only minimally probative, this photograph carries a substantial risk of unfair prejudice. Because [Defendant] and [the former student] are visibly drinking alcohol in this photograph the jurors may conclude [Defendant] has inappropriate relationships with former students. Additionally, [the former student] is a known hooligan, likely known to the jurors. The jurors may associate the bad deeds of [the former student] with [Defendant] simply by

association. Such possible inferences are improper and highly prejudicial. As such, the evidence should be excluded under Rule 403.

C. The photograph of [Defendant's] chemistry class is irrelevant and could lead the jury to improperly conclude that [Defendant] enlisted his students to make methamphetamine.

When agents raided [Defendant's] classroom during his chemistry class, they seized a photograph [Defendant] had taken of the students conducting a science experiment. That and some allergy medicine was all that law enforcement found. Because there is nothing in the photograph that ties [Defendant] to manufacturing methamphetamine, the photograph should be excluded. It makes no fact of consequence more or less likely.

But even crediting some minimal relevance, for example evidence that [Defendant] had access to chemistry equipment, the risk of unfair prejudice is high. The Government alleges that [Defendant] manufactured blue meth. The photograph that they seek to admit of the chemistry class is of students making a blue substance. It is misleading in that it may cause the jury to conclude that [Defendant] used his students to aid in meth manufacturing. This conclusion is completely unsupported. But the risk is significant. Additionally, when considering a piece of evidence under Rule 403, the Court may consider whether there are less prejudicial but equally persuasive ways for the party to prove its point. *Old Chief v. United States*, 519 U.S. 172 (1997). Here, the Government has far less prejudicial ways to prove that [Defendant] had access to chemistry equipment. For example, the Government could simply have an agent testify that they found chemistry equipment in the classroom and enter that equipment into evidence. This risk of unfair prejudice substantially outweighs the minimal probative value of this photograph. This photo should be excluded. Fed. R. Evid. 403.