

# Denver Law Review

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Volume 67  
Issue 4 *Tenth Circuit Surveys*

Article 29

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February 2021

## Evidence

Denver University Law Review

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### Recommended Citation

Denver University Law Review, Evidence, 67 Denv. U. L. Rev. 739 (1990).

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## EVIDENCE

*United States v. Bernard*, 877 F.2d 1463

Author: Judge Brorby

Defendant, Bernard, was convicted of conspiracy and bank fraud. He was also convicted of making false entries as a bank officer. Bernard appealed, asserting that the district court erred in permitting his attorney to testify, and in determining that he had waived his attorney-client privilege.

The Tenth Circuit affirmed, holding that Bernard sacrificed his attorney-client privilege by voluntarily disclosing confidential communications to a nonparty in an effort to induce the nonparty into action. The court stated that the attorney-client privilege need not be allowed when the party claiming it is attempting to utilize it in a manner that is inconsistent with the privilege.

Moreover, under Fed. R. Evid. 103, an error may not be predicated upon a ruling which admits or excludes evidence unless a substantial right is affected. The court concluded that no substantial right was affected by the attorney's testimony, and the assertion of error was without merit.

*Boren v. Sable*, 887 F.2d 1032

Author: Judge Brorby

Plaintiff, Boren, brought this action against his plant manager, defendant, Sable. Boren appealed a jury verdict in favor of Sable, contending that the district court erred in finding statements made by Boren's co-workers inadmissible hearsay.

Affirming the district court's ruling, the Tenth Circuit held that the co-workers' statements did not qualify as admissions of a party-opponent under Fed. R. Evid. 801(d)(2)(d). Application of Rule 801(d)(2)(d) requires a three-part showing. First, the existence of the employment relationship must be established independent of the declarant's statement. Second, the statement must be made during the existence of the declarant's agency or employment. Third, the statement must concern a matter within the scope of declarant's employment. Where a party-opponent controls the operations of the corporate employer and controls the daily tasks of the declarant, an agency relationship is established for purposes of Rule 801(d)(2)(d). Boren failed to establish that such control existed.

*United States v. Eufracio-Torres*, 890 F.2d 266

Author: Judge Brorby

Defendant, Eufracio-Torres ("Torres"), appealed his convictions for transporting illegal aliens, claiming the district court erred in admit-

ting into evidence deposition testimony of material witnesses and Torres's prior convictions for illegal entry into the United States.

The Tenth Circuit found that the witnesses' fifth amendment rights against being detained when charged with no crimes outweighed Torres's sixth amendment right to confrontation. Finding the government's efforts to produce the witnesses "reasonable" and in "good faith," the court affirmed that the witnesses were "unavailable" for trial under Fed. R. Evid. 804(a). Thus, the district court properly admitted the deposition testimony.

The court further held that the introduction of evidence regarding Torres's prior convictions was proper for the limited purpose of showing his knowledge of the aliens' illegal presence pursuant to Fed. R. Evid. 404(b). The court noted that the limiting instructions to the jury prevented undue prejudice.

*Head v. Lithonia Corporation*, 881 F.2d 941

Author: Judge Moore

Defendant, Lithonia Corporation ("Lithonia"), appealed from a judgment on a jury verdict in favor of plaintiff, Head. Lithonia claimed that the district court abused its discretion in permitting Head's expert to testify in an area outside his expertise, and in admitting evidence based on data that is not reasonably relied upon by experts in the field.

The Tenth Circuit found that the record did not sufficiently establish the trustworthiness of certain medical testing (topographical brain mapping), or its acceptance in the relevant scientific community. Thus, the court held, the district court abused its discretion in failing to address Lithonia's objection to the introduction of testimony based on topographical brain mapping without a proper foundation. The court vacated the judgment and remanded for a new trial.

*Marsee v. United States Tobacco Co.*, 866 F.2d 319

Author: Judge Seth

Plaintiff, Marsee, brought a products liability action against defendant, United States Tobacco Company ("Tobacco"), a manufacturer of snuff tobacco products. Marsee initiated the action on behalf of decedent who died of oral cancer. The district court held for Tobacco and Marsee appealed.

The Tenth Circuit upheld the verdict. It ruled that: (1) a videotaped deposition of a severely disfigured cancer patient was overly prejudicial and inadmissible in the absence of evidence that the witness' oral cancer was in fact caused by the use of snuff; (2) the district court's hearsay exclusion of certain cases not alluded to in the doctor's direct testimony, but used as a basis for his opinions, was not sufficiently erroneous to set aside the jury verdict in favor of the defendant; (3) rebuttal testimony of the decedent's physicians, as well as scientific charts, were properly excluded as needlessly cumulative; (4) reports published by

non-governmental health agencies were properly excluded as repetitive; and (5) articles introduced by Tobacco to show that decedent had notice of the dangers of tobacco products were properly admitted into evidence.

*New England Mutual Life Insurance Co. v. Anderson*, 888 F.2d 646

Author: Judge Seth

Plaintiff, New England Mutual Life Insurance Company ("New England"), sought a declaratory judgment that defendant, Anderson, had fraudulently procured an insurance policy. New England attempted to enter into evidence a newspaper article in which Anderson had made certain admissions. The district court refused entry of the article, holding that it represented inadmissible hearsay. New England appealed.

The Tenth Circuit held that the article was hearsay because the admissions were actually statements of a third-party reporter who was unavailable for cross-examination and the statements were offered to prove the truth of the matters asserted. The court further held that newspaper articles do not inherently satisfy any of the exceptions or exclusions to the hearsay rule. The article does not rise to the level of an adoptive admission under Fed. R. Evid. § 801(d)(2) merely because Anderson failed to dispute, contradict, or protest its contents. Newspaper articles are also not self-authenticating under Fed. R. Evid. § 902(6).

*Nichols v. Sullivan*, 867 F.2d 1250

Author: Judge Seymour

During Plaintiff, Nichols' criminal trial, two of the State's witnesses referred to Nichols' prior incarceration despite the judge's orders to avoid such testimony. In district court, Nichols alleged that references to prior convictions violated his right to due process, fair trial, and his due process right to an impartial judge. The district court dismissed with prejudice Nichols' petition for a writ of *habeas corpus* and Nichols appealed. The State argued, however, that Nichols' *habeas corpus* petition should not be heard because Nichols had not presented his due process challenge in state court and, thus, had not exhausted state remedies.

The Tenth Circuit found that Nichols had cited the fifth amendment due process clause as a basis for his claim to the state court. Consequently, Nichols exhausted his state remedies. The court also held that Nichols' due process rights were not denied because references to Nichols' past convictions were not sufficiently prejudicial to warrant a mistrial. Further due process was afforded Nichols when the judge offered to give a cautionary instruction to the jury. Also, the court stated that evidence of prior convictions could have been admitted for purposes of impeachment when Nichols took the stand. Nichols, therefore, did not suffer prejudice of a constitutional dimension. The court also held that Nichols was not denied due process simply because the sentencing judge had knowledge of Nichols' past convictions. The court stated there was no evidence of "actual bias" or "likelihood of bias or appear-

ance of bias” on the part of the sentencing judge. The order of the district court dismissing the petition for a writ of *habeas corpus* was affirmed.

*United States v. Porter*, 881 F.2d 878

Author: Judge Tacha

Defendant, Porter, appealed his conviction of bank burglary, claiming that the district court abused its discretion by admitting certain bad acts evidence and by refusing to admit certain hearsay testimony. Porter also alleged that the district court improperly gave an *Allen* instruction and that the evidence was insufficient to support his conviction.

The Tenth Circuit held that the district court’s admission of bad acts evidence without specifically articulating the grounds was not an abuse of discretion because its purpose was apparent from the record. The district court’s exclusion of a hearsay statement was permissible because the statement failed to satisfy the trustworthiness rationale of Fed. R. Evid. 804(b)(3). The court found that the *Allen* instruction was not unduly coercive, but was a proper exercise of the judge’s duty to guide the jury. Finally, the court held that there was sufficient evidence in the record to support the jury’s verdict. The judgment was affirmed.