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THE REST OF THE STORY… THE RULE OF COMPLETENESS

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INTRODUCTION:

No one likes to be quoted out of context or damned by half-truths or incomplete statements that reveal only the inculpatory parts when the remainder, if exposed, would cast the story in an entirely different (and more favorable) light.

The law is no different in its distaste for mis-(or under-) representations of fact that would steer factfinders to a particular (i.e., erroneous) conclusion (e.g., that the defendant admitted guilt) if the adversary did not elicit the entirety of the statement. (e.g., "the defendant did admit that he stabbed the victim BUT added that it was in self-defense.").

Dating back to the common law, the Rules of Evidence have allowed that when one party has offered only a portion of a statement or conversation or writing in support of a particular conclusion, the adverse party may offer any relevant remainder that is NECESSARY TO COMPLETE, EXPLAIN OR QUALIFY such evidence.

As stated by the Court of Appeals in Rouse v Whited, 28 NY 170 (1862), a Civil War-era case, "where a statement forming part of a conversation is given in evidence, whatever was said by the same person in the same conversation that would in any way qualify or explain that statement is also admissible." (Citing Prince v Samo, 7 Adol & Ellis 627 [1838]).

The rule is basically one of fairness that permits the party against whom only some evidence has been offered to clarify or explain an alleged admission, explain a prior inconsistent statement, or put it into proper context by bringing out other parts that fill in the blanks left by the other side.

As the Court of Appeals observed in Gratton v Metropolitan Life Insurance Co., 92 NY 274 (1883), "the rule appears to be firmly settled both as to conversations and writings that the introduction of a part renders admissible so much of the remainder as tends to explain or qualify what has been received and that is to be deemed a qualification which rebuts and destroys the inference to be derived from or the use to be made of the portion put in evidence."

THE NEW YORK RULE:

New York Advisory Evidence Rule 4.03 (Completing, Explaining a Writing, Recording, Conversation or Transaction), states that:

When part of a writing, conversation, recorded statement or testimony, or evidence of part of a transaction is admitted, ANY OTHER PART of that writing, conversation, recorded statement or testimony, or evidence of any other part of the transaction, may be admitted WHEN NECESSARY TO COMPLETE, EXPLAIN OR CLARIFY the previously admitted part.

The TIMING of the admission of such additional parts is WITHIN THE DISCRETION OF THE TRIAL JUDGE. (See People v Torre, 42 NY 2d 1036 [1977]}, People v Gallo, 12 NY 2d 12 [1962]).

So, for example, if the prosecutor were to admit on direct examination only a portion of a taped jailhouse conversation between the defendant and his girlfriend wherein, he admitted that cocaine was found in his gym bag, defense counsel might: immediately ask the judge to direct the prosecutor to play that part where the defendant claimed that he had previously lent the gym bag to a friend who had recently returned it, or elicit such information on cross examination or bring it in during the defense case (which might well be too late for maximum benefit).

See also, CPLR 3117(b): If only part of a deposition is read at trial by a party, any other party MAY READ ANY OTHER PART OF THE DEPOSITION WHICH OUGHT, IN FAIRNESS, BE CONSIDERED IN CONNECTION WITH THE PART READ.

THE RULE HAS ITS LIMITS:

In People v Schlessel, 196 NY 476, 487 (1909), the Court of Appeals reversed the defendant's conviction for defrauding creditors (by assigning a check payable to him for $1,972.43 to his brother) because the trial court admitted evidence of a third-party petition filed in Bankruptcy Court to set aside the allegedly fraudulent, subsequent sale of the defendant's house (as evidence of criminal intent when he conveyed the above-referenced check to his brother).

The People argued and the trial court agreed that the defendant had opened the door to this evidence when he asked a prosecution witness (receiver-in-bankruptcy) about the sale of the property, specifically, whether the petition had alleged that the buyer realized a benefit of $22,000.00 on property for which he only paid $2,700.00. The witness answered that he didn't know whether such information was contained in the petition.

The petition was received into evidence in its entirety over objection and was published to the jury. The court told the defense, "If you open the door on cross examination, they (the People) have the right on rebuttal to prove what they want to prove in the petition."

When the jury asked the court how to interpret the petition as evidence, the court explained (contrary to its earlier cautionary instruction), that the petition was allowed into evidence just as other checks and transactions were received because they reflected upon the defendant's intent when transferring his property, including the check which he handed over to his brother.

The Court of Appeals found the "open door" argument (permitting evidence of an allegedly fraudulent subsequent sale of his house as evidence of the defendant's intent in transferring the check to his brother) to be so unsound as to barely warrant serious consideration. The Court observed that there was "no tenable theory" which permits the reception of evidence that is not only irrelevant but is also "intensely hostile"' (i.e., unfairly prejudicial) to the defendant.

The Court further explained that where part of a document Is received, other parts may become admissible (because they QUALIFY, LIMIT OR EXPLAIN the relevant matter first introduced), but this was no such case. Here, when the witness claimed ignorance of the bankruptcy petition's contents, in the Court's view, there was nothing that required further explanation or clarification.

In short, it was reversible error to admit evidence of an allegedly fraudulent sale of his house in bankruptcy (for grossly inadequate consideration) to prove criminal intent in conveying a check to the defendant's brother months earlier.

With respect to the right of a party against whom an utterance has been admitted to offer the remainder in order to elucidate the total tenor and effect thereof, the Court directed that:

a. No utterance that is irrelevant to the issue be admitted.
b. No more of the remainder of the utterance than concerns the SAME SUBJECT and is EXPLANATORY OF THE FIRST PART is receivable.
c. The remainder thus received MERELY AIDS in the CONSTRUCTION OF THE UTTTERANCE AS A WHOLE and is NOT ITSELF TESTIMONY.

So, to be admissible, the remainder of the statement must be RELEVANT, EXPLANATORY, LIMITED TO THE SAME SUBJECT MATTER and only serve to aid in the understanding of the entire statement.

THE FEDERAL RULE:

Federal Rule of Evidence (FRE) 106 states that if a party introduces all or part of a WRITING or RECORDED STATEMENT, an adverse party may require the introduction AT THAT TIME of any other part or ANY OTHER WRITING or recorded statement that, in fairness, ought to be considered at the same time.

This rule appears by its terms to be limited to written or recorded statements (unlike the New York Rule which also includes oral conversations, testimony, or evidence of transactions), and it provides for an IMMEDIATE response (rather than leaving the timing of the introduction of responding evidence to the judge's discretion).

Like its New York counterpart, the Federal Rule is based on principles of fundamental fairness, thus permitting receipt of other portions of a statement offered only in part. The Federal Rule also allows RELATED STATEMENTS to be admitted to ensure that the jury will view the statement in question in its full context. (See article, "*FRE 106: Hardly a Fait Acompli*," by Prof. Veronica Finkelstein, Drexel Law Review, Thomas R. Kline School of Law, 8/14/19, drexel.edu).

In the article, the author notes that Federal Circuit Courts are split over whether the rule also admits oral testimony/statements (1st and 7th Circuits-yay, 6th Circuit-nay, ~~[~~US v Shaver, 81 F Appx 529 [6th Cir 2009]), as well as otherwise inadmissible evidence (e.g., hearsay) to complete or clarify evidence that was introduced only partially. For example, the Sixth Circuit has interpreted FRE 106 to admit only admissible evidence while the First and Third Circuits (focusing more on the rule's purpose than its text) view the rule as creating an exception to exclusionary rules (e.g., Hearsay) in the interest of providing context, completeness, and fairness.

In suggesting that the FRE should be broadened to include oral statements (e.g., memorialized in writings, reports, and letters as in Beech Aircraft Corp v Rainey, 488 US 153 (1988), the author points to the FRE Advisory Committee's recommendation that the rule be amended to state:

If a party introduces all or part of a STATEMENT, an adverse party may require the introduction at that time of another part, or any other statement that in fairness ought to be considered at the same time.

a. A statement admissible under this rule should NOT be excluded under the rules against hearsay.
b. In a criminal case, if evidence admissible under this rule and offered by the defendant is excluded under any other rule, the entire statement must be excluded.

If amended as recommended, the rule would permit the admission of oral statements into evidence.

SECOND CIRCUIT VIEW:

The Second Circuit, like the Sixth Circuit, views FRE 106 as NOT including oral statements to complete or clarify an incomplete statement but points to FRE 611 which empowers the trial court to control the mode and order of presenting and examining witnesses to promote the truth-finding purpose of the proceedings.

In US v Williams, 2019 WL 932436 (2d Cir 2019), the court noted that the broader common law rule of completeness (embodied in FRE 611) covers not only writings (and recordings) taken out of context, but also extends to the incomplete use of acts, declarations, and conversations, (See also Beech Aircraft Corp v Rainey, supra).

The guiding principle is that trial courts should be guided by fairness and common sense in promoting clarity, context, and completeness whether contemporaneously or on cross examination to elucidate the true tenor of the statement as a whole. (See "*Second Circuit Fleshes Out Common Law Rule of Completeness*," 7/29/19, Ed., Colin Miller, Univ. of South Carolina Law School, EvidenceProfBlog, lawprofesors@typepad.com_

In Williams, the court held, however, that it was not error to preclude introduction of the defendant's initial denial of ownership of a gun found in a vehicle after which he changed his tune and confessed. The court said that the Rule of Completeness does not mandate the admission of a self-serving, exculpatory statement which is followed, not by an explanation or qualification, but by a reversal of position on the defendant's part.

WHAT ABOUT TESTIMONIAL HEARSAY?

In Hemphill v NY, __US__ 2020 WL 174223 (1/20/22), the US Supreme Court held that the admission of a third party's guilty plea under New York's "Open Door" Rule to rebut the defense of third-party culpability (i.e., that the third party was the killer) violated the defendant's right to confrontation under the Sixth Amendment as explained in Crawford v Washington, 541 US 36 (2004). (See article #100, *US Supreme Court Limits NY Open-Door Rule*…, 1/25/22 at acp.org).

The Court did NOT, however, reach the question whether the Rule of Completeness would permit the introduction of testimonial hearsay to explain, clarify or complete a hearsay statement that the defendant had introduced into evidence.

The concurring justices, however, took the view that a defendant who introduces only the exculpatory portion of a hearsay statement (from an unavailable witness who was never cross examined), forfeits the right to preclude the introduction of the remaining portion of such statement that happens to be inculpatory.

See also New York Advisory Evidence Rule 8.19 describing how a defendant can forfeit the right of confrontation (i.e., suffer the admission of a witness' prior testimony) by engaging or acquiescing in conduct aimed at preventing such witness from testifying. (People v Geraci, 85 NY 2d 359 [1995]).

FINAL THOUGHT:

Given that the overarching purpose of the rules of evidence is to ensure that cases are decided fairly upon relevant, reliable (and admissible) evidence, it stands to reason that evidence that misleads, confuses, or presents only a partial picture of the reality that the jury is asked to decipher and base its decision on, should not be admitted without further explanation or context.

On the other hand, prosecutors (or plaintiffs' attorneys) who paint with miserly strokes run the inevitable risk of appearing sneaky (if not dishonest) and, for their part, defendants who open too many cans of paint (or the wrong shade) may well invite the other side (however unwittingly), to fill in the canvas with colors that, overall, create a not-so-pretty picture.

As with all potential evidence, understanding its purpose, scope and limitations is key to a successful outcome at trial.