

Instructions for Fed. R. Evid. 801(d)(2)(E) Proffer & Objections

If a defendant timely files a motion for Rule 801(d)(2)(E) determination, a motion for a “James hearing,” or a motion to similar effect, the Court will set deadlines for the parties to complete the following:

Step One. No later than the deadline imposed by the Court, the Government must file on the docket its proffer, consisting of two parts. The two parts may comprise one document, or the second part may be filed as an attachment to the first part, as appropriate. The two parts are as follows:

1. A narrative proffer of facts tending to show that a conspiracy or conspiracies existed, the time(s) in which it existed, the members of the alleged conspiracy or conspiracies, and the members’ respective roles in the conspiracy.
2. A proffer of specific statements in a Word or WordPerfect table or Excel spreadsheet, presented as follows:

#	Name of Likely Trial Witness(es)	Substance of Likely Trial Witness(es) Expected Testimony	Additional Context, if needed	Basis for Admission	Defendant’s Objection(s)	Court’s Ruling
[Consecutively number each statement.]	<i>[Identify the witness(es) expected to testify at trial about what the alleged co-conspirator, other than the defendant, said, wrote, or otherwise communicated in furtherance of the conspiracy.]</i>	[On/between] [date, approximate date, or date range], [name of alleged co-conspirator declarant other than the defendant] [said/wrote/non-verbally communicated], “[Verbatim quote, fair paraphrase, or best guess as to how the trial witness will quote the co-conspirator declarant].” [Citation to source, including Bates numbers if available.]	<i>[If necessary, briefly describe additional context that may help the Court to evaluate the statement.]</i>	<i>[Briefly describe basis for admission, or cite to a separately provided chart.]</i>	<i>[Leave blank.]</i>	<i>[Leave blank.]</i>

THE COLUMN HEADINGS MUST REPEAT ON EACH PAGE, BOTH WHEN VIEWED ON THE COMPUTER AND WHEN PRINTED.

Additional commentary on certain columns:

- **“Substance of Likely Trial Witness(es) Expected Testimony.”**
 - If the statement does not fit the template provided, it is probably not a statement amenable to pretrial evaluation under Rule 801(d)(2)(E). For example, if the declarant was the defendant, or was not an alleged co-conspirator, Rule

801(d)(2)(E) evaluation is not appropriate. If a trial witness will not be testifying about a statement made (as opposed to an act done) by an alleged co-conspirator, Rule 801(d)(2)(E) evaluation is not appropriate.

- The specified date or date range almost always must fall within the date range of the conspiracy. If it does not, the statement is likely not admissible under Rule 801(d)(2)(E).
 - In many cases, the cited source will not provide the specific quote, but will simply be the source that causes the Government to expect that a witness will testify at trial that a particular alleged co-conspirator made a particular statement.
 - **Deviation from the template may be necessary in rare cases, but before the Government deviates, it should first reevaluate whether it is actually presenting a statement subject to Rule 801(d)(2)(E) evaluation.**
- **“Basis for Admission.”** If the Government will be invoking the same bases for admission repeatedly, the Government may provide a chart that correlates the various bases for admission to a letter or number, and then the Government may simply list the appropriate letter(s) or number(s).

Step Two. On the same day that the Government completes Step One, it must transmit an editable version of the table or spreadsheet, filled out as directed above, to counsel for the defendant.

Step Three. In the “Defendant’s Objection(s)” column, Defendant’s counsel should describe the Defendant’s objection(s). Like the Government, Defendant’s counsel may refer to a summary chart.

Step Four. No later than the deadline imposed by the Court, Defendant’s counsel must file on the docket a response to the Government’s proffer, including or attaching (as appropriate) the filled-out table or spreadsheet. On the same day, Defendant’s counsel must e-mail the editable version of the table or spreadsheet to martinez_chambers@cod.uscourts.gov.